

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Richard Larry Self,
Movant/Defendant
-vs-
United States of America,
Respondent/Plaintiff.

CV-13-8199-PCT-DGC (JFM)
CR-10-8036-PCT-DGC

**Report & Recommendation
on Motion to Vacate, Set Aside or
Correct Sentence**

I. MATTER UNDER CONSIDERATION

Movant, following his conviction in the United States District Court for the District of Arizona, filed on July 29, 2013 a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 1) and Memorandum in Support (Doc. 2). On March 19, 2014, Respondent filed its Response (Doc. 15). Movant filed a Reply on June 16, 2014 (Doc. 21). On September 29, 2014, Petitioner re-filed (Doc. 24) his Memorandum in Support of his Petition because of a defect in the electronically filed version.

The Movant's Motion is now ripe for consideration. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 10, Rules Governing Section 2255 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

In his Motion to Suppress, Movant described the factual background as follows:

This investigation began on November 5, 2008, when the Child Exploitation Section of the ICE (Immigration and Customs

1 Enforcement) Cyber Crimes Center received information regarding
2 a website containing child pornography, known as DreamZone. ICE
3 agents verified that the website contained pornography and that the
4 website could be accessed by “members” to the website for a
5 monthly fee. ICE agents accessed this site for a monthly fee of
6 \$99.00 after an agent completed the transaction with an undercover
7 identity and credit card. The undercover agent received a user name
8 and password, accessed the website, and found child pornography
9 within the site. ICE then obtained the web access logs from
10 November 11, 2008, through November 20, 2008, and matched IP
11 addresses with specific image files that were accessed from each IP
12 address. Pursuant to this search warrant, ICE identified the e-mail
13 address of richardrimrock@AOL.com (“Rimrock IP”) as one of the
14 IP addresses that accessed the DreamZone website on November
15 18, 2008. The logs further showed that on this date the Rimrock IP
16 downloaded numerous images of child pornography from the
17 website.

18 Pursuant to further subpoenas to AOL, ICE determined that,
19 as of January 30, 2009, the account holder for the Rimrock IP was
20 Richard Self at a P.O. Box in Rimrock, Arizona, and that the
21 relevant phone number was assigned to Richard Self through a
22 Verizon account that had been effective since April 15, 2008, with
23 the same P.O. Box in Rimrock. In May of 2009, ICE reviewed the
24 motor vehicle database for records of Richard Self and identified a
25 residential address on Desert Pine Road in Rimrock, Arizona.

26 On November 15, 2009, ICE agents conducted surveillance
27 at the Desert Pine address and observed a motor vehicle that was
28 registered to Mr. Self at the Desert Pine address. In December of
2009, ICE obtained another subpoena for the AOL account holder
information, and it was the same as the January 2009 information
for Mr. Self.

Based on this information alone, the ICE agent avowed that
he believed Richard Self spent money to purchase a membership to
a website devoted to child pornography and thus that Mr. Self has a
sexual interest in children. Further, the application for the search
warrant states that the agent believes that Mr. Self accessed and
downloaded child pornography on November 18, 2010, from the
DreamZone website. Thus, the agent concluded there was probable
cause to believe that there was child pornography at the residence.

The application for the search warrant also contains a
boilerplate section regarding “common characteristics” of persons
who collect child pornography. Among other things, the application
states that “[t]hese collections [of child pornography] are often
maintained for several years and are kept close by, usually at the
collector’s residence, to enable the individual to view the collection,
which is valued highly.”

The search warrant was executed at the residence on
February 8, 2010. Defendant was not present at his residence during
the execution of the warrant. Mr. Self’s step-son, who lived next
door and allowed the agents into the residence, told the agents that
Mr. Self had left on February 6, 2010, with his wife on a business
trip driving his company’s semi-tractor/truck to Florida. At the
residence, agents found computer generated printouts that contained
photographs of child pornography. Also, agents found several
hundred pages of print documents containing narratives describing
sexual conduct with children. Agents also found documents

1 indicating the purchase of a Verizon wireless mobile broadband
2 device, but did not find the broadband device or a laptop computer.
3 Agents did find two older-model tower computers that did not
4 appear to contain any child pornography but did contain website
5 advertising banners related to child pornography sites.

6 Based on the above information, another search warrant was
7 obtained to search the semi-tractor/truck that Mr. Self was driving.
8 This warrant was executed on February 18, 2010, pursuant to a
9 traffic stop of the vehicle. Mr. Self and his wife were in the vehicle.
10 During the search of the vehicle, the agents found two laptops, one
11 of which it was later determined contained images of child
12 pornography. The agents also found several thumb drives and other
13 electronic material containing child pornography. An indictment
14 was obtained against Mr. Self for possession of child pornography,
15 and he was arrested on March 14, 2009, pursuant to a traffic stop.
16 The agents searched the vehicle and found electronic material that
17 later was determined to contain documents that contained narratives
18 describing sexual activity with children, similar to the documents
19 obtained from Mr. Self's residence.

20 (CR-10-8036-PCT-DGC Doc. 47 at 3-6 (citations omitted).)¹ (Documents filed in the
21 criminal case, CR-10-8036-PCT-DGC, are referenced hereinafter as "CR Doc. ____.")
22

23 **B. PROCEEDINGS AT TRIAL**

24 On March 9, 2010, Movant was indicted (CR Doc. 1) in the District of Arizona
25 case CR-10-8036-PCT-DGC on four counts of Possession of Child Pornography, with
26 forfeiture allegations. Counsel was appointed. (CR Doc. 5, M.E. 3/15/10.)

27 On September 21, 2010, a Superseding Indictment was filed (CR Doc. 35),
28 charging Movant with 3 counts of Transportation of Child Pornography, 3 counts of
Possession of Child Pornography, and forfeiture allegations.

Counsel filed a Motion to Suppress (CR Doc. 47) seeking to suppress evidence
seized at Movant's home on January 27, 2010 for lack of probable cause to support the
warrant, and evidence seized in the ensuing searches of his truck and car, as fruits of the
poisonous tree. The motion was denied. (CR Doc. 69, Order 11/12/10.)

Movant proceeded to a jury trial on November 17, 2010. (CR Doc. 78, M.E.
11/17/10.) He was found guilty as charged. (CR Doc. 90, Verdict.)

Counsel moved for a downward depart and variances in sentencing. (CR Doc.

¹ Movant was, in fact, arrested on March 14, **2010**. (See CR Doc. 19, Arrest Warrant Returned Executed.)

93.) The motion was denied, and on March 14, 2011 Movant was sentenced to concurrent terms of 135 months on the transportation charges, and concurrent terms of 120 months on the possession charges, for an effective sentence of 135 months. (CR Doc. 95, M.E. 3/14/11; CR Doc. 97, Judgment.)

C. PROCEEDINGS ON DIRECT APPEAL

Movant filed a direct appeal, appealing the denial of his motion to suppress on the basis that the lapse of time between the first lead and the search warrant was so long as to render the information stale and prevent a finding of probable cause. Movant also challenged his sentence. The Ninth Circuit Court of Appeals rejected his arguments, and affirmed the convictions and sentences. (CR Doc. 117, Memorandum Decision.)

D. PRESENT FEDERAL HABEAS PROCEEDINGS

Motion – Movant commenced the current case by filing Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 on July 29, 2013 (Doc. 1). Movant asserts the following eight grounds for relief:

- (1) Movant's counsel was ineffective in failing to investigate the validity of three search warrants;
- (2) Movant's counsel was ineffective in allowing Movant to be indicted, tried, and convicted in violation of Movant's right to be free from double jeopardy;
- (3) Movant's counsel was ineffective for failing to challenge prosecutorial misconduct;
- (4) Movant's counsel was ineffective for failing to object to irrelevant evidence of prior bad acts;
- (5) Movant's counsel was ineffective when she failed to introduce evidence that others lived in Movant's household, had access to Movant's AOL account and use of the computer, and that of the five computers seized, "only one was dirty";
- (6) Movant's counsel was ineffective because counsel refused to let the probation officer interview Movant, members of Movant's family, or any of Movant's friends;
- (7) Movant's counsel was ineffective by failing to present evidence that someone else could have committed the crime; and
- (8) The Court abused its discretion by failing to resolve the conflict between Movant and Movant's counsel and for not appointing new counsel.

(Doc. 4, Service Order.)

Response - On March 19, 2014, Respondent filed its Response (Doc. 15). Respondent argues that the first seven grounds, asserting ineffective assistance, are without merit. Respondent argues that Ground Eight is procedurally defaulted for failing to raise it on direct appeal.

Reply - Movant filed a Reply on June 16, 2014 (Doc. 21), addressing the merits of his ineffective assistance claims, and arguing that his Ground 8 is not procedurally defaulted.

Supplement – Upon reviewing the filed record, the Court observed that the electronically filed version of Movant’s Memorandum in Support (Doc. 2) had become partially unreadable, and no paper versions were available. Movant was directed to re-file his Memorandum in Support and attached exhibits. (Order 9/15/14, Doc. 23.) On September 29, 2014, Movant complied and again filed his Memorandum in Support and exhibits (Doc. 24).

III. APPLICATION OF LAW TO FACTS

A. GROUNDS 1-8: INEFFECTIVE ASSISTANCE CLAIMS

Generally, claims of ineffective assistance of counsel are analyzed pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail on such a claim, Petitioner must show: (1) deficient performance - counsel’s representation fell below the objective standard for reasonableness; and (2) prejudice - there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* at 687-88. Although the petitioner must prove both elements, a court may reject his claim upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial. *Id.* at 697.

1. Ground 1: Ineffective Assistance re Search Warrant

In his Ground 1, Movant asserts that counsel was ineffective in failing to adequately investigate the validity of the three search warrants. (Motion, Doc. 1 at 5;

Memorandum, Doc. 2 at 1-4.) Movant asserts four specific defects in the searches and warrants, addressed hereinafter as subparts (a) through (d). Respondent argues that defense counsel adequately investigated, and filed a motion to suppress the evidence seized during the searches.

a. Ground 1(a): IAC re No New Probable Cause to Search Home

Movant argues that trial counsel should have challenged the search of the home on the basis that there was no new probable cause asserted to support the second warrant to search the home which was issued after the first warrant expired unserved. Respondent argues that the motion to suppress addressed the staleness and lack of probable cause to support the search of the home, and that no new statement of probable cause was required to support the warrant. Moreover, Respondent argues this issue was addressed by the Ninth Circuit in Movant's direct appeal. (Response, Doc. 15 at 16-17.) Movant replies that the second warrant amounted to an improper reissuance of the first warrant based upon a stale statement of probable cause. (Reply, Doc. 21 at 2-3.)

Respondent appears to conflate the staleness of the information in the probable cause statement used to support a warrant, with the staleness of the statement or affidavit itself. The former was addressed by the Ninth Circuit in Movant's direct appeal (and may not be revisited in this proceeding). (CR Doc. 117, Mem. Dec. at 4.)² The latter is the argument Movant now makes.

In support of his contention that a new probable cause statement was required, Petitioner cites to *U.S. v. Lacy*, 119 F.3d 742 (9th Cir. 1997), *U.S. v. Grubbs*, 547 U.S. 90 (2006), and *Sgro v. U.S.*, 287 U.S. 206 (1932). Nothing in these cases suggests that a new affidavit must be submitted when an expired warrant is being reissued. These cases

² The Ninth Circuit seems to have been unaware of the issuance of the earlier warrant. It was not addressed in the trial court's ruling on the issue. (CR Doc. 69, Order 11/12/10 on Motion to Suppress.) The parties have provided no record of the earlier warrant. The undersigned presumes for purposes of this Report and Recommendation that there was an earlier warrant, and that the same affidavits and statement of probable cause were used for both.

1 simply stand for the proposition that affidavits in support of warrant requests “must be
2 based on facts ‘ ‘so closely related to the time of the issue of the warrant as to justify a
3 finding of probable cause at that time.’ ” *U.S. v. Lacy*, 119 F.3d 742, 745 (9th Cir. 1997)
4 (indirectly quoting *Sgro*, 287 U.S. at 210). At best, *Sgro* held that an expired warrant
5 may not simply be reissued without a new finding of probable cause, based upon timely
6 affidavits.

7 The issue of a second warrant is essentially a new proceeding which
8 must have adequate support...The statute in terms requires him
9 before issuing the warrant to take proof of probable cause. This he
10 must do by examining on oath the complainant and his witness and
11 requiring their affidavits or depositions. The proof supplied must
12 have appropriate relation to the application for the new warrant and
13 must speak as of the time of the issue of that warrant. The
14 commissioner has no authority to rely on affidavits which have sole
15 relation to a different time and have not been brought down to date
16 or supplemented so that they can be deemed to disclose grounds
17 existing when the new warrant is issued.

18 287 U.S. at 211. Thus, *Sgro* did not mandate new affidavits or statements, merely timely
19 information.

20 Moreover, *Sgro* did not establish any time limit on when the affidavits have come
21 to “have sole relation to a different time.” In *Lacy*, the court observed that such a
22 determination is a fact specific inquiry.

23 However, “[t]he mere lapse of substantial amounts of time is not
24 controlling in a question of staleness.” “We evaluate staleness in
25 light of the particular facts of the case and the nature of the criminal
26 activity and property sought.” The information offered in support of
27 the application for a search warrant is not stale if “there is sufficient
28 basis to believe, based on a continuing pattern or other good
29 reasons, that the items to be seized are still on the premises.”

30 *Lacy*, 119 F.3d at 745-46 (internal citations omitted). Of course, in this case, the
31 question whether the information was stale has been decided by the Ninth Circuit on
32 Movant’s direct appeal.

33 Movant fails to establish new affidavits or statements of probable cause were
34 mandatory, despite the freshness of the information contained in the original. The
35 undersigned has found no such requirement.

36 Thus, the undersigned concludes that an attack based on the reliance on the same

1 affidavits in issuing the second warrant would have been without merit. “The failure to
2 raise a meritless legal argument does not constitute ineffective assistance of counsel.”
3 *Baumann v. United States*, 692 F.2d 565, 572 (9th Cir. 1982).

4 Accordingly, Ground 1(a) is without merit.

5
6 **b. Ground 1(b): IAC re Warrant on Home Not Properly Served**

7 Movant argues that trial counsel should have challenged the search of the home
8 on the basis that the search warrant for the home was not properly served because the
9 attachments and affidavit were not served, and the warrant was not served at the outset of
10 the search on his son-in-law, the caretaker of the property. Respondent argues that
11 presentation of the warrant is not required at the outset of the search, and that the
12 affidavit or other supporting exhibits need not be presented at all. (Response, Doc. 15 at
13 17-18.) Respondent further argues that a warrant need not be served on a non-occupant
14 caretaker when a residence is unoccupied at the time the warrant is executed, and that in
15 any event copies were left at the home, and may have been shown to the son-in-law
16 before entry was gained. (*Id.* at 18, and n. 7.) Movant replies that it is unclear whether
17 service of the warrant is required. (Reply, Doc. 21 at 3-4.)

18 In support of his argument that service of the warrant at the outset of the search is
19 required, Movant relies upon *U.S. v. Gantt*, 194 F.3d 987 (9th Cir. 1999), *U.S. v. Hector*,
20 474 F.3d 1150, 1154 (9th Cir. 2009), and the separate opinion of Justices Souter, Stevens
21 and Ginsburg in *U.S. v. Grubbs*, 547 U.S. 99 (2006). (Reply, Doc. 21 at 3-4.)

22 In *Gantt*, the Ninth Circuit held that Federal Rule of Criminal Procedure 41(d)
23 (now at Fed. R. Crim. P. 41(f)) required that a search warrant be served at the outset of a
24 search. 194 F.3d at 1001-1002. Seven years later, the majority opinion in *Grubbs*
25 appeared to have rejected that holding:

26 In fact, however, neither the Fourth Amendment nor Federal Rule of
27 Criminal Procedure 41 imposes such a requirement. “The absence
28 of a constitutional requirement that the warrant be exhibited at the
outset of the search, or indeed until the search has ended, is ...
evidence that the requirement of particular description does not

1 protect an interest in monitoring searches.” The Constitution
2 protects property owners not by giving them license to engage the
3 police in a debate over the basis for the warrant, but by interposing,
4 ex ante, the “deliberate, impartial judgment of a judicial officer ...
between the citizen and the police,” and by providing, *ex post*, a
right to suppress evidence improperly obtained and a cause of action
for damages.

Grubbs, 547 U.S. at 99.

5 Movant suggests that the special concurrence in *Grubbs* leaves the question open.
6 And indeed, Justice Souter asserted that prior decisions of the Court left open the
7 question whether there was a “right of an owner to demand to see a copy of the warrant
8 before making way for the police,” “and it remains undetermined today.” 547 U.S. at
9 101. Indeed, in *U.S. v. Hector*, the Ninth Circuit addressed the decision in *Grubbs*, and
10 concluded: “It is not clear whether [*Grubbs*] overrules the Ninth Circuit's precedent on
11 the requirement to present a copy of the warrant to the owner of the premises at the time
12 of the search.” 474 F.3d 1150, 1154 (9th Cir. 2007). *But see U.S. v. Miller*, 2013 WL
13 4805616, 5 (D.Ariz. 2013) (report and recommendation concluding that *Grubbs*
14 overrules *Gantt*) (issue avoided in Order modifying, 2013 WL 4026851, 3 (D.Ariz.
15 2013). At a minimum, the Ninth Circuit has recognized the *Grubbs* decision effectively
16 reduces the “legitimate interest served by the presentation of a warrant” to be “head[ing]
17 off breaches of the peace by dispelling any suspicion that the search is illegitimate.”
18 *U.S. v. Hector*, 474 F.3d 1150, 1155 (9th Cir. 2007). That interest is not affected when a
19 search warrant is executed when the premises are vacant.

20 Movant also complains that the affidavit and other attachments were not included
21 with the copy of the warrant eventually left at the premises. However, Rule 41 does not
22 mandate the delivery of anything other than the warrant and a receipt for the property
23 taken. There is no “constitutional mandate that an executing officer possess or exhibit
24 the affidavit or any other document incorporated into the warrant at the time of the
25 search in order for the warrant to be valid.” *U.S. v. Hurwitz*, 459 F.3d 463, 472 (4th Cir.
26 2006). *See also Baranski v. Fifteen Unknown Agents of Bureau of Alcohol, Tobacco and*
27 *Firearms*, 452 F.3d 433, 444 (6th Cir. 2006) (no constitutional requirement or
28

1 requirement under Rule 41 to leave incorporated affidavits, etc.).

2 Even if there were some basis to assert an obligation to serve the warrant and/or
3 the affidavits or attachments, a motion to suppress founded upon such a service
4 requirement would have been futile for two reasons. First, even when applying *Gantt*,
5 the Ninth Circuit has held that suppression for violations of Rule 41 are only appropriate
6 where:

7 1) the violation rises to a “constitutional magnitude;” 2) the
8 defendant was prejudiced, in the sense that the search would not
9 have occurred or would not have been so abrasive if law
enforcement had followed the Rule; or 3) officers acted in
“intentional and deliberate disregard” of a provision in the Rule.

10 *U.S. v. Williamson*, 439 F.3d 1125, 1133 (9th Cir. 2006).³ *Grubb* establishes that there is
11 no violation of a constitutional magnitude. Petitioner has not proffered any prejudice in
12 the form of the search resulting from the failure to serve the warrant at the outset. And,
13 there is no indication that the officers acted deliberately in disregard of the rule. *See e.g.*
14 *Williamson*, 439 F.3d at 1133-1134 (failure to serve not deliberate violation, even though
15 intentional, when based on misunderstanding of requirement).

16 Second, Movant was not present when the warrant was executed, and thus cannot
17 complain of the lack of service of the warrant. “Just as a person who is somewhere else
18 cannot benefit from the ‘assurance provided by the showing of a warrant, an absent
19 person has no present stake in the contemporaneous opportunity to monitor the search
20 for compliance with the warrant. Thus the interest in the ‘notice’ that showing a warrant
21 provides, likewise, does not run to someone who is not there and who cannot exercise
22 that option.” *U.S. v. Silva*, 247 F.3d 1051, 1059 (9th Cir. 2001).

23 Accordingly, any attempt to mount challenges to the timing or lack of service of
24 the warrant or its attachments, supporting affidavits, etc. would have been futile, and
25 failure to do so would not have been ineffective assistance. *Baumann*, 692 F.2d at 572.

26 Therefore, Ground 1(b) is without merit.

27
28 ³ *Grubbs* was decided March 21, 2006. *Williamson* was decided March 13, 2006, and
thus was decided without benefit of *Grubbs*.

1 **c. Ground 1(c): IAC re Warrant on Truck Not Properly Served**

2 Movant argues that trial counsel should have challenged the search of the truck on
3 the basis that the search warrant for the truck was not properly served because the
4 attachments and affidavit were not served, and the serving agent refused to provide a
5 copy of the warrant at the outset of the search.

6 As discussed hereinabove, with regard to the execution of the warrant on
7 Movant's home (with the exception of the distinction that Movant was present when the
8 vehicle was searched), any argument based upon the timing or lack of delivery of the
9 warrant to search the truck would be without merit. The fact of Movant's presence
10 would give him standing to mount the objection, but even if *Gantt* survives *Grubbs*,
11 Movant fails to establish a constitutional violation (and cannot under *Grubbs*), asserts no
12 prejudice, and fails to proffer anything to establish a deliberate violation of the Rule.
13 Accordingly, this claim would also be without merit, and cannot support a claim of
14 ineffective assistance. *Baumann*, 692 F.2d at 572.

15 Therefore, Ground 1(c) is without merit.

16
17 **d. Ground 1(d): IAC re Improper Search and Seizure of Movant and Wife**

18 Movant argues that trial counsel should have challenged the search of his truck on
19 the basis that Movant and his wife were searched, his effects were seized, and they were
20 locked in a law enforcement vehicle during the search of his vehicle, all without
21 *Miranda* warnings, even though the warrant did not extend to them or their effects.
22 Respondent argues that the detention of occupants during a search is permitted, and no
23 *Miranda* warnings are required. Respondent argues there is no evidence that Movant
24 was searched, he cannot complain of the search of his wife, and no evidence from such
25 searches was presented at trial, precluding a finding of prejudice. (Response, Doc. 15 at
26 18-19.) Movant replies that the authorities relied on by Respondent with regard to the
27 detention and ensuing search are distinguishable on the basis that the warrants were for
28 evidence, not contraband, and that the searches of Petitioner's effects did not occur until

1 the conclusion of the search of the vehicle. (Reply, Doc. 21 at 4-6.)

2 **Movant's Wife** - Movant has no standing to complain about the detention and
3 search of his wife. "Fourth Amendment rights are personal rights which...may not be
4 vicariously asserted...No rights of the victim of an illegal search are at stake when the
5 evidence is offered against some other party." *Alderman v. U.S.*, 394 U.S. 165, 174
6 (1969). Consequently, any challenges by counsel on this point would have been without
7 merit.

8 **Detention** - Movant attempts to distinguish cases relied upon by Respondents,
9 e.g. *Michigan v. Summers*, 452 U.S. 692 (1981), to justify detention during a search. He
10 does so on the basis that the cases cited deal with searches for contraband, while the
11 search of Movant was simply for evidence.

12 In a footnote, the *Summers* Court indicated they did "not decide whether the same
13 result would be justified if the search warrant merely authorized a search for evidence."
14 452 U.S. at 705, n. 20. In *Muehler v. Mena*, 544 U.S. 93 (2005), however, the Court
15 applied *Summers* where the search was for "deadly weapons and evidence of gang
16 membership." *Id.* at 94-95. Moreover, this contraband/evidence distinction was
17 explicitly rejected by the Ninth Circuit in *Dawson v. City of Seattle*, 435 F.3d 1054
18 (2006). "Thus, the doctrine of *Michigan v. Summers*, permitting police officers to detain
19 individuals during a search, and the principle of *Muehler*, holding that the authority to
20 detain incident to search is categorical, apply to all searches upon probable cause, not
21 just to searches for contraband." *Dawson*, 435 F.3d at 1066.

22 Even assuming that this remained a significant distinction, Movant's factual
23 premise is flawed. Here, the warrant to search the vehicle included not only evidentiary
24 types of things (correspondence, records, etc.), but "images of child pornography and
25 files containing images of child pornography." (CR Doc. 47, Mot. to Supp. at Exhibit B,
26 Warrant, at Attachment B, at 56.) Such images would be contraband the same as the
27 narcotics being searched for in *Summers*.

28 Accordingly, any challenge based upon the detention would have been without

merit.

Miranda Warnings - Movant complains that he was not given *Miranda* warnings. Respondent properly argues that *Miranda* only applies to “custodial interrogation”, but makes the logical jump that Movant’s *Summers* detention during the search did not require the warnings. (Response, Doc. 15 at 19.) However, in *U.S. v. Kim*, 292 F.3d 969 (9th Cir. 2002) the court explicitly rejected an argument by the government that the principles of *Summer* “support the conclusion that police officers executing a search warrant need not give *Miranda* warnings to an individual detained and questioned during a search.” *Id.* at 976.

The police did not interrogate Summers during the detention. If they had asked questions going beyond a brief *Terry*-type inquiry, see *Terry v. Ohio*, 392 U.S. 1, 29, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (permitting a brief stop and inquiry that are “reasonably related in scope to the justification for their initiation”), Summers would, it appears, have been entitled to *Miranda* warnings.

Kim, 292 F.3d at 976. The *Kim* court went on to conclude that the detention in that case had morphed into a custodial interrogation which required *Miranda* warnings.

Nonetheless, here Movant makes no assertions that any interrogation ensued. (*See e.g.* Memorandum, Doc. 2 at 3-4.) Nor does Movant suggest that any statements were made by him while he was detained, nor that any such statements were entered into evidence against him. (*Id.*)

“Our cases also make clear the related point that a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule.” *U.S. v. Patane*, 542 U.S. 630, 641 (2004). “Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial.” *Id.*

Consequently, any challenge based upon the lack of *Miranda* warnings would have been without merit.

Search of Personal Effects – Finally, Movant complains that he was searched as part of the search of the vehicle. However, “police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing

1 the object of the search.” *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999). Here, the
2 categories of objects being searched for, *e.g.* passwords, encryption keys, etc. (*see* CR
3 Doc. 47, Mot. to Supp. at Exhibit B, Warrant, at Attachment B, at 60), could easily be
4 concealed in a pocket, wallet, etc.

5 Moreover, even assuming that the searches were prohibited, Movant makes no
6 suggestion that any evidence used at trial was obtained during or derived from the search
7 of his person, wallet, etc. as opposed to the search of the vehicle.

8 Consequently, any challenge based upon the search of Movant and his personal
9 effects would have been without merit.

10
11 **f. Summary re Ground 1** – Movant fails to show that counsel performed
12 deficiently in challenging the various searches, warrants, etc. Accordingly, Ground 1 is
13 without merit and must be denied.

14
15 **2. Ground 2: Ineffective Assistance re Double Jeopardy**

16 In his Ground 2, Movant alleges that counsel was ineffective in allowing Movant
17 to be indicted, tried, and convicted in violation of Movant’s right to be free from double
18 jeopardy. Movant’s theory is that possession is a lesser included offense of
19 transportation, and thus he could not properly have been convicted of both types of
20 offenses. Respondent argues that the possession charges were not lesser included
21 offenses of the transportation offenses because the images in the three possession
22 charges were different than the images in the three transportation charges. (Answer,
23 Doc. 15 at 20.) Movant replies that simultaneous possession of more than one image
24 may only result in one conviction, citing *U.S. v. Polouizzi*, 564 F.3d 142 (2nd Cir. 2009)
25 and *U.S. v. Chiaradio*, 684 F.3d 265, 279 (1st Cir. 2012). In support of his contention
26 that possession is the lesser included offense of transportation he cites *U.S. v. Kennedy*,
27 643 F.3d 1251 (9th Cir. 2011) and *U.S. v. Davenport*, 519 F.3d 940 (9th Cir. 2008).
28 (Reply, Doc. 21 at 6-8.)

1 **Multiple Possession Charges** – Movant argues that the three possession charges
 2 amounted to a single offense, citing *Poluizzi* and *Chiaradio*.

3 In *Polouizzi*, the defendant was convicted of violations of 18 U.S.C. §
 4 2252(a)(4)(B). That statute proscribes the possession of “1 or more books, magazines,
 5 periodicals, films, video tapes, or other matter which contain *any visual depiction*” of
 6 child pornography. (Emphasis added.) The *Polouizzi* court concluded that this
 7 construction made the focus on the possession of the matter which contained *any* number
 8 of images, and thus a single book or other repository containing multiple images would
 9 only amount to one violation. Moreover, because it referred to “1 or more,” then “a
 10 person who simultaneously possesses multiple books, magazines, periodicals, films,
 11 video tapes, or other matter containing a visual depiction of child pornography [is
 12 subject] to only one conviction under 18 U.S.C. § 2252(a)(4)(B).” 564 F.3d at 155.
 13 Similarly, the Ninth Circuit had concluded many years before that under § 2252(a)(4)(B)
 14 “the ‘matter’ is the physical medium that contains the visual depiction—in this case, the
 15 hard drive of Lacy’s computer and the disks found in his apartment.” *U.S. v. Lacy*, 119
 16 F.3d 742, 748 (9th Cir. 1997).

17 But, here Movant’s convictions for possession were under 18 U.S.C. §
 18 2252A(a)(5)(B), not § 2252A(a)(4)(B). (CR Doc. 97, Judgment.) This provision
 19 proscribes possession of “*any* book, magazine, periodical, film, videotape, computer
 20 disk, or any other material that contains an image of child pornography.” 18 U.S.C. §
 21 2252A(a)(5)(B) (emphasis added). In *U.S. v. Hinkeldey*, the Eight Circuit relied upon
 22 that very distinction (“1 or more” vs. “any”) to distinguish *Polouizzi* in a plain error
 23 analysis applying § 2252A(a)(5)(B). 626 F.3d 1010, 1014 (8th Cir. 2010). Similarly, in
 24 *U.S. v. Chiaradio*, 684 F.3d 265 (1st Cir. 2012), upon which Movant relies, the First
 25 Circuit distinguished *Polouizzi* on the same basis.

26 With respect to possession offenses, section 2252A(a)(5)(B)
 27 prohibits knowingly possessing “*any* book, magazine, periodical,
 28 film, videotape, computer disk, or any other material that contains
 an image of child pornography.” 18 U.S.C. § 2252A(a)(5)(B)
 (emphasis supplied). The use of the word “*any*” contrasts sharply

1 with section 2252(a)(4)(B), which criminalizes possessing “one or
2 more” matters containing any image. Id. § 2252(a)(4)(B) (emphasis
3 supplied).

4 *Chiaradio*, 684 F.3d at 275. Thus, under § 2252A(a)(5)(B), the possession of multiple
5 materials establishes multiple violations.

6 Thus, in *U.S. v. Woerner*, 709 F.3d 527 (5th Cir. 2013), the Fifth Circuit addressed
7 this issue under §2252A(a)(5)(B) (which Movant was convicted of violating), and held
8 that each different “material” (containing one or more images) was a separate offense.
9 “The allowable unit of prosecution for § 2252A(a)(5)(B) is each ‘material,’ or medium,
10 containing an image of child pornography.” *Woerner*, 709 F.3d at 540. In that case, two
11 separate convictions were sustained based upon possession of a computer and a flash
12 drive, each containing images.

13 *Woerner* was founded upon the Fifth Circuit’s analysis in *U.S. v. Planck*, 493 F.3d
14 501, 504 (5th Cir. 2007) (“where a defendant has images stored in separate materials (as
15 defined in 18 U.S.C. § 2252A), such as a computer, a book, and a magazine, the
16 Government may charge multiple counts, each for the type of material or media
17 possessed”). In *U.S. v. Schales*, 546 F.3d 965 (9th Cir. 2008), the Ninth Circuit cited
18 *Planck* approvingly.

19 Here each of Movant’s charges of possession was founded upon a separate media
20 storage device. Count 4 was founded upon possession of “a compact disc (referred to as
21 CD 1)”; Count 5 on possession of “a compact disc (referred to as CD 2)”; and Count 6
22 on possession of “a Verbatim 4GB USB thumb drive.” (CR Doc. 35, Superseding
23 Indictment at 2.) Thus, *Polouizzi* is distinguishable, and *Chiaradio* supports multiple
24 convictions. Therefore, Movant’s conviction was based on three separate violations,
25 each based on a different “material.”

26 Accordingly, any challenge by counsel on this basis would have been futile.

27 **Lesser Included Offense** – Movant argues that his possession convictions were
28 lesser included offenses of his transportation convictions. In support of this argument,
Movant relies upon *U.S. v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011) and *U.S. v.*

1 *Davenport*, 519 F.3d 940 (9th Cir. 2008). Those cases conclude that “*possession* of child
2 pornography, § 2252A(a)(5)(B), is a lesser-included offense of *receipt* of child
3 pornography, § 2252A(a)(2).” *Kennedy*, 643 F.3d at 1258, n. 11 (citing *Davenport*, 519
4 F.3d at 945) (emphasis added).

5 Here, however, Movant was not convicted of *possession* and *receipt*, but of
6 *possession* and *transportation*. As the Court observed in *Kennedy*, that issue has not
7 been resolved in the 9th Circuit. “Although we have not held that possession of child
8 pornography is a lesser-included offense of transportation of child pornography, the
9 government has not appealed this determination, and therefore we need not reach the
10 issue here; rather, we assume for purposes of this appeal that the district court’s analysis
11 was correct.” *Kennedy*, 643 F.3d at 1258, n. 11. *Cf. Chiaradio*, 684 F.3d at 280
12 (possession of child pornography not a lesser include offense of distribution).

13 Moreover, an offense is only a lesser included offense if it and the greater offense
14 are based on the same underlying conduct. “Stated in reciprocal terms, where separate
15 conduct supports each offense, the Fifth Amendment’s Double Jeopardy Clause is not
16 implicated.” *U.S. v. Overton*, 573 F.3d 679, 695 (9th Cir. 2009). Here, the three
17 possession charges were founded upon Movant’s possession of three sets of material,
18 containing the images “image 943[1].jpg,” “m_p_1.jpg,” and “22_03797....”. In
19 contrast, his transportation charges were founded upon Movant’s transportation of three
20 separate images, “(pthc) Izzy 02.avi,” “3-10.jpg,” “dogg_78956...”. (CR Doc. 35,
21 Superseding Indictment.)⁴

22 Accordingly, even if possession is a lesser included offense of transportation of
23 the same images, Movant has failed to show that the underlying conduct was the same,
24 *i.e.* the images *possessed* were the same as the images *transported*. Consequently, this
25 claim is without merit, and counsel was not ineffective for failing to raise it.

26 ⁴ Respondents proffer nothing to show that the transported images were not contained on
27 the same “material” (e.g. CD 1, CD2 and the Verbatim drive). But, unlike the possession
28 provision (§ 2252A(a)(5)(B)), which is focused upon the possession of “material,” the
transportation provision (§ 2252A(a)(1)) is focused upon the transportation of “any child
pornography.”

3. Ground 3: Ineffective Assistance re Prosecutorial Misconduct

In his Ground 3, Movant argues trial counsel was ineffective for failing to challenge prosecutorial misconduct based upon: (a) the prosecution of multiplicitous offenses; (b) the use of stories found on materials obtained during the vehicle search to obtain a detention order, deny a travel order, in opening statements, etc., where there was no evidence to link Movant to the authoring or knowing possession of the stories; (c) failure to investigate and disclose evidence of others using Movant's computer; (d) presentation of perjured testimony at the detention hearing; (e) failing to investigate fingerprint and DNA evidence to exonerate Petitioner; (f) permitting the illegal searches and seizures; and (g) failure to "mention" "clean" computers found at Movant's home and in his vehicles.⁵ (Memorandum, Doc. 2 at 7-11.)

a. Ground 3(a): IAC re Misconduct re Multiplicitous Offenses

Movant argues counsel was ineffective for failing to assert prosecutorial misconduct for prosecuting multiplicitous offenses. Ordinarily, charging decisions are uniquely within the discretion of the prosecutor and not subject to judicial intervention. *See U.S. v. Redondo-Lemos*, 955 F.2d 1296, 1298-99 (9th Cir.1992), *overruled on other grounds* by *U.S. v. Armstrong*, 48 F.3d 1508 (9th Cir.1995). There are circumstances that result in an exception. *See Gershman, Prosecutorial Misconduct* § 4:1, *et seq.* (2d ed.) (identifying selective, vindictive, and bad faith charging as charging decisions amounting to judicially cognizable prosecutorial misconduct). However, Movant provides nothing to suggest that a simple decision to charge multiplicitous offenses would be an exception.

Even assuming such a claim would be cognizable, for the reasons discussed

⁵ In his Reply, Movant asserts additional grounds for arguing of prosecutorial misconduct, e.g. pursuing a superseding indictment with tougher charges, and threatening the use of stories regarding incest; misrepresenting Movant's wife as his ex-wife. (Reply, Doc. 21 at 8-11.) Movant has not sought to amend his Motion to add these additional allegations, and they are factually and legally separate and distinct bases for asserting prosecutorial misconduct, and hence ineffective assistance of trial counsel. Consequently, they are not addressed herein.

1 hereinabove, Movant has failed to show that the charges were multiplicitous. (*See infra*
2 discussion concerning Ground 2 regarding double jeopardy.)

3
4 **b. Ground 3(b): IAC re Misconduct re Use of Stories**

5 Movant argues that the prosecutor engaged in misconduct by using sexually
6 graphic stories involving *inter alia* sexual conduct with children, where there was no
7 evidence to link Movant to the authoring or knowing possession of the stories.
8 Respondent argues that the stories were found on CD-1 and a RiData thumb drive found
9 in Movant's vehicle, that trial counsel challenged their introduction, the trial court issued
10 limiting instructions, the evidence presented was in accordance with those instructions,
11 and the trial court issued a limiting instruction to the jury on their consideration of the
12 evidence. (Response, Doc. 15 at 21-23.) Movant replies that Respondent had available
13 to it other evidence to show Movant's knowledge, *i.e.* testimony from Movant's wife,
14 and thus the use of the stories was simply to show a proclivity to commit the child
15 pornography offenses. (Reply, Doc. 21 at 8-9.)

16 Indeed, counsel did challenge the introduction of the stories, including the
17 absence of evidence on some of the stories that they were authored by Movant, and that
18 the introduction of the evidence should be precluded from use as bad act evidence under
19 Federal Rule of Evidence 404(b) as unfairly prejudicial. Counsel argued that while
20 courts had found such evidence to prove intent to possess child pornography such use
21 was subject to an undue prejudice analysis. Counsel further argued that "the
22 Government has substantial other forensic evidence taken from the examination of the
23 computers and media that would support a finding that the Defendant would have had
24 knowledge of what was contained on the thumb drives, computers, and CDs." (CR Doc.
25 57, Response to Notice of Intent at 7.)

26 In response, the Court concluded that subject to the redactions and other
27 limitations, the evidence was not unduly prejudicial, and that it was admissible. (CR
28 Doc. 70, Order 11/12/10 at 5-7.)

The Court also concludes that the stories, as the government has proposed to redact and present them (Doc. 67), satisfy the requirements of Rule 404(b). (1) They tend to prove a material fact – that Defendant is interested in the sexual exploitation of children, a fact that tends to show Defendant knew of the child pornography on his computer and storage devices; (2) the stories were located on the laptop and storage devices found in Defendant’s tractor-trailer during the search, and in Defendant’s home during the search, and therefore are not too remote in time; (3) the evidence is sufficient to support a finding that Defendant authored the stories and stored them on the laptop and storage devices that also contained child pornography; and (4) Defendant’s authorship of the stories is sufficiently similar to the possession of child pornography to be relevant on the question of knowledge.

(*Id.* at 7.)

Under these circumstances, the undersigned cannot find any likelihood that a different outcome would have occurred on the objection to the stories, had counsel made the additional arguments asserted by Movant (e.g. the lack of evidence of Movant’s knowledge of his possession of the stories, and the availability of testimony from Movant’s wife to show knowledge).

Consequently, there is no reason to believe that an assertion of prosecutorial misconduct on this basis would have been anything but futile. Consequently, counsel was not ineffective for failing to pursue such a claim.

c. Ground 3(c): IAC re Misconduct re Others on Computer

In his Ground 3(c), Movant argues counsel was ineffective for failing to assert a claim of prosecutorial misconduct based upon the failure to investigate and disclose evidence of others using Movant’s computer. Respondent argues that the claim is without merit because there was no evidence of such usage, and the defense was provided access to the available evidence (e.g. the seized computer and media). (Response, Doc. 15 at 23.) Petitioner replies that the investigating agent testified that “they could not say who was using the computer or the media.” (Reply, Doc. 21 at 11.)

Movant misapprehends the duty of the prosecution with regard to exculpatory evidence. “While *Brady* [*v. Maryland*, 373 U.S. 83, 87 (1963)] requires the Government

1 to tender to the defense all exculpatory evidence in its possession, it establishes no
 2 obligation on the Government to seek out such evidence.” *U. S. v. Walker*, 559 F.2d
 3 365, 373 (5th Cir. 1977). *See U.S. v. Polizzi*, 801 F.2d 1543, 1553 (9th Cir. 1986)
 4 (prosecution under no obligation to disclose material of which it was not aware nor in
 5 possession of).

6 Here, the testimony of the agent referenced by Movant indicates that the
 7 government had no information of use by others. Movant proffers nothing to show that
 8 such evidence existed, or that it was in the possession or control of the prosecution.
 9 Accordingly, this claim of prosecutorial misconduct would have been without merit, and
 10 counsel was not ineffective for failing to pursue it.

11
 12 **d. Ground 3(d): IAC re Misconduct re Perjured Testimony**

13 In his Ground 3(d), Movant argues counsel was ineffective for failing to assert a
 14 claim of prosecutorial misconduct based upon the presentation of perjured testimony at
 15 the detention hearing. Movant argues Agent Shrable misrepresented at the detention
 16 hearing that he attended the execution of the search warrant at Movant’s home and talked
 17 with Movant’s wife between that search of the home and the search of the vehicle.
 18 Movant argues that Shrable later testified he was authorized to be on leave, that Agent
 19 Koski executed the warrant, and that Movant’s wife was travelling with him at the time
 20 of the alleged conversations. (Memorandum, Doc. 2 at 9.) Respondent argues that
 21 Shrable never stated he was present when the search was conducted and clarified on
 22 redirect that the conversation may have been later, but in any event the statement at the
 23 pre-trial proceeding would not have prejudiced the outcome of the trial. (Response, Doc.
 24 15 at 24 and n. 16.) Movant does not reply.

25 The prosecutor has a constitutional duty to correct testimony he knows to be false.
 26 *Napue v. Illinois*, 360 U.S. 264, 269–70 (1959). “In assessing materiality under *Napue*,
 27 we determine whether there is ‘ ‘any reasonable likelihood that the false testimony could
 28 have affected the judgment of the jury;’ ’ if so, then ‘the conviction must be set aside.’ ”

1 *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005). Here, the alleged misrepresentations
2 were not made at trial, but at a pretrial detention hearing. There is no indication that the
3 jury was made aware of any uncorrected falsehood. Thus, any such falsehoods could not
4 have affected the judgment of the jury in convicting Movant. Accordingly, this claim of
5 prosecutorial misconduct would have been without merit, and counsel was not
6 ineffective for failing to pursue it.

7
8 **e. Ground 3(e): IAC re Misconduct re Fingerprint and DNA Evidence**

9 In his Ground 3(e), Movant argues that counsel was ineffective for failing to
10 assert a claim of prosecutorial misconduct based upon the failure to “follow through on”
11 fingerprint and DNA evidence.⁶ Movant asserts that the fingerprints came from someone
12 other than Movant, and that there was DNA material that the prosecution failed to test.
13 (Memorandum, Doc. 2 at 9-10.) Respondent argues that such evidence would have not
14 altered the outcome because it would have, at best, shown that someone other than
15 Movant touched the materials. Respondent also argues that trial counsel cross examined
16 Agent Shrable on the failure to pursue the DNA, and the jury nonetheless convicted.
17 (Response, Doc. 15 at 24-25.) Movant replies that the prosecution made excuses but
18 failed to pursue the material because it would have “shown Defendant[‘]s actual
19 innocents [sic].” (Reply, Doc. 21 at 10.)

20 Movant overstates the persuasive effect of any such evidence. As noted by
21 Respondent, it would not have shown Movant’s innocence. At best, it would have
22 shown that someone else had touched the items. While this may have created some
23 inference that a third party may have been responsible for the child pornography, that
24 inference would have been limited. Movant does not, for example, suggest that anyone
25 touching the items must have been the one placing the child pornography on them.

26 ⁶ Email correspondence provided by Movant between the prosecution and defense
27 counsel reflects that the fingerprint was found “on a plastic case for a camera card.” It
28 also reflects that “[t]here was no pornography found on any of the camera cards.”
(Memorandum, Doc. 2 at Exhibit 1, Email 11/10/10.) Thus, the relevance of the finger
print evidence would have been further limited.

1 Indeed, a third party may have innocently touched the items (e.g. at the time of sale, to
2 relocate them in the residence or vehicle, etc.) without ever altering their contents.
3 Indeed, many people could have touched them without doing so. There is no substantial
4 likelihood that such a slight inference would have overcome the other evidence that
5 linked Movant to the child pornography.

6 More importantly, as with Ground 3(c), Movant simply misapprehends the
7 obligation of the prosecution. Movant does not suggest that the existence of the
8 fingerprints or DNA was not disclosed to the defense, nor that the defense was not able
9 to conduct the DNA testing. He simply complains that the prosecution failed to
10 investigate the information they had. That was not the prosecution's obligation. *See*
11 *Walker*, 559 F.2d at 373.

12 Accordingly, this claim of prosecutorial misconduct would have been without
13 merit, and counsel was not ineffective for failing to pursue it.

14 Moreover, ineffective assistance is not shown "where counsel's actions or
15 omissions reflected tactical decisions, even if better tactics appear in retrospect to have
16 been available." *U.S. v. Stern*, 519 F.2d 521, 524 (9th Cir. 1975). The court need not
17 determine the actual reason for an attorney's actions, as long as the act falls within the
18 range of reasonable representation. *Morris v. California*, 966 F.2d 448, 456-457 (9th
19 Cir. 1991), *cert. denied*, 113 S. Ct. 96 (1992). Here, counsel had a tactical reason for not
20 pressing the issue of the DNA evidence by asserting prosecutorial misconduct. Such an
21 effort would likely have resulted in the prosecution pursuing the testing. At best, the
22 testing might have shown contact with the media by a third party. This would, as
23 discussed above, have been of limited effect. At worst, it could have reflected Movant's
24 DNA. By not challenging the issue, counsel was able to argue the question of whose
25 DNA it was, and the ability to make the implication that the prosecution was hiding
26 something by not pursuing testing.

27 Indeed, counsel elicited testimony from Agent Shrable on the point:
28

Q And there was some cellular material located on some of the storage devices or adapters; is that correct?

A As reflected in the report from the Arizona Department of Public Safety, that is correct.

Q And they indicated that if the government desired to do any DNA analysis, that it would be necessary to obtain a blood sample from the defendant; is that correct?

A That is correct.

Q And there was no attempt to do that; is that correct?

A There was not.

(CR Doc. 112, R.T. 11/18/10 at 397-398.) Counsel made further use of the lack of testing at closing:

You also heard testimony there was some DNA material found on some of the cases for some of the media and that the government did not bother to do any testing on this material. The excuse given was that they did not have enough time to get the DNA testing done. I would remind you that the evidence here was seized in February 18th of 2010 and it's been nine months since that time.

(CR Doc. 113, R.T. 11/19/10 at 441.)

Accordingly, counsel had a reasonable tactical basis for not pursuing this claim of prosecutorial misconduct, and thus was not ineffective for not doing so.

f. Ground 3(f): IAC re Misconduct re Illegal Searches and Seizures

In his Ground 3(f), Movant argues that counsel was ineffective for failing to assert a claim of prosecutorial misconduct based upon the illegal searches and seizures. Respondent points to the lack of merit to the attacks on the searches. Movant does not reply on this issue.

Even if, assuming *arguendo*, that a prosecutor engages in misconduct justifying relief from a conviction by proceeding with a prosecution involving an illegal search or seizure, then for the reasons discussed hereinabove in connection with Ground 1, Movant has failed to show that there were illegal searches or seizures conducted in this case, or that any prejudice resulted.

Accordingly, this claim of prosecutorial misconduct would have been without merit, and counsel was not ineffective for failing to pursue it.

//

1 **g. Ground 3(g): IAC re Misconduct re Clean Computers**

2 In his Ground 3(g), Movant argues that counsel was ineffective for failing to
3 assert a claim of prosecutorial misconduct based upon the prosecution's failure "to
4 mention" that four of the five computers found in the home and vehicle were "clean" of
5 any child pornography. (Memorandum, Doc. 2 at 10-11.) Respondent does not respond
6 on this claim, and Movant does not reply.

7 Just as there is no obligation to investigate for exculpatory evidence, Movant
8 points to no obligation of the prosecution to present or argue exculpatory evidence. The
9 undersigned knows of none. At most, there is an obligation to disclose the information
10 when it is in the prosecution's possession. Movant does not suggest that the defense was
11 not provided that information.

12 Accordingly, this claim of prosecutorial misconduct would have been without
13 merit, and counsel was not ineffective for failing to pursue it.

14
15 **h. Summary re Ground 3**

16 Movant's Ground Three is based on the contention that trial counsel was
17 ineffective in failing to pursue challenges based on prosecutorial misconduct. For the
18 reasons discussed hereinabove, Movant has failed to show a viable claim of prosecutorial
19 misconduct. Accordingly, counsel was not ineffective for failing to pursue such claims,
20 and Ground 3 is without merit.

21
22 **4. Ground 4: Ineffective Assistance re Failure to Object to Prior Bad Acts**

23 In his Ground 4, Movant argues that trial counsel was ineffective for failing to
24 object to the evidence of the "stories." Movant argues that there was insufficient
25 evidence to link the stories to Movant, pointing to a brother-in-law as potential source,
26 and arguing that the indication that the stories were authored by "Richard Self" could
27 have been a fraudulent ruse. Further, Movant argues that the evidence was cumulative,
28 confusing, and unduly prejudicial, serving only to paint him as a "bad man." In support

1 of his claim, Movant cites *U.S. v. Johnson*, 439 F.3d 884 (8th Cir. 2006) and *U.S. v.*
2 *Grimes*, 244 F.3d 375 (5th Cir. 2000). Respondent argues that the claim is meritless,
3 pointing to counsel's objections to admission of the evidence, and objection at trial, and
4 for the reasons discussed in connection with Ground 3(b). (Response, Doc. 15 at 25.)
5 Movant replies that trial counsel only opposed the stories as cumulative, repetitive, and
6 misleading, but failed to oppose them on the basis of a lack of attribution to Movant, and
7 to assert the potential of a fraudulent use of Movant's name as an author.

8 Trial counsel did oppose the introduction of the stories, including arguing that
9 they were not "intertwined" with the charged offenses and thus not necessary to
10 presenting a comprehensible story of the commission, inadmissible under Rule 404(b),
11 and unfairly prejudicial under Rule 403. (CR Doc. 57, Response at 5-8.) At trial, counsel
12 renewed the objection as to each story admitted. (CR Doc. 112, R.T. 11/18/10 at 351,
13 352, 354.)

14 Movant argues that counsel should have objected on the basis of a lack of
15 attribution to Movant. There was, however, a basis for attribution, including the fact that
16 the stories had been found on Movant's media, purported to be authored by Movant, and
17 reflected characteristics of Movant (e.g. his name, status as a truck driver, and purported
18 status as a veteran of the Vietnam war). (CR Doc. 112, R.T. 11/18/10 at 350-355.)
19 Although not irrebuttable evidence of Movant's authorship or even ownership of the
20 stories, there was evidence which connected the stories to Movant. Thus, an objection
21 on that basis would have been futile.

22 Although such matters would not have supported an "objection," trial counsel did
23 seek to argue to the jury that the stories could not be attributed to Movant. Trial counsel
24 argued at closing that multiple people had access to Movant's residence and the computer
25 and other media, and Movant was away for extended periods of time. (CR Doc. 113,
26 R.T. 11/19/10 at 442-444.)

27 Movant complains that counsel did not present evidence of a fraudulent use of
28 Movant's name. Movant proffers nothing to show that counsel was aware of any

1 fraudulent use of Movant's name, or had reason to investigate. The use Movant points to
2 was a fraudulent scheme to obtain a mortgage on a victim's property, transferring the
3 proceeds into an account in the name of "Richard Self." (CV-08-0838-PHX-MHM,
4 *Jernigan v. Ryan*, Doc. 18, Report & Recommendation at 2-3.) Movant proffers nothing
5 to suggest that counsel was aware of this case, had any reason to pursue an investigation
6 that would have led to the case, or that it was anything more than a coincidence that
7 Movant's name was used in that case.

8 Movant suggests challenges under Rule 404(b) based on *Johnson* and *Grimes*.
9 That rule provides: "Evidence of a crime, wrong, or other act is not admissible to prove a
10 person's character in order to show that on a particular occasion the person acted in
11 accordance with the character."

12 In *Johnson*, the court observed that, under the rule, prior bad act evidence may be
13 admitted for purposes other than to prove criminal disposition. The defendant in
14 *Johnson* was charged with possession of child pornography, did not deny possession, but
15 asserted that the pornography had been inadvertently downloaded without his
16 knowledge. The prosecution sought to introduce evidence that the defendant possessed
17 paper copies of stories of rape of young girls. The Eighth Circuit observed:

18 Offering the stories added nothing to aid the jury in determining
19 whether child pornography could be inadvertently downloaded.
20 Instead, it encouraged the jury to conclude Johnson intentionally
 and knowingly sought out images of child pornography because he
 had a propensity to possess such materials.

21 *Johnson*, 439 F.3d at 888. Thus, the court concluded that the evidence was offered to
22 prove criminal disposition, in violation of Rule 404(b).

23 Similarly, in *Grimes*, the Fifth Circuit faced a defendant charged with possession
24 of child pornography, who argued that the images had been inadvertently obtained. The
25 government sought to introduce evidence that narratives of sexual abuse of minors were
26 also found on the computer, which had been downloaded the prior year. There, however,
27 the court concluded that the narratives were admissible under Rule 404(b), because they
28 were probative of intent to possess the images, an issue other than the defendant's

1 character. Nonetheless, the Fifth Circuit went on to find that the portions of the
2 narratives introduced were so graphic as to be unfairly prejudicial. Thus, *Grimes* would
3 not have supported an argument under Rule 404(b).

4 Here, trial counsel's argument under 404(b) was not supported by *Johnson* (or
5 *Grimes*) but was supported by an in depth discussion of the Ninth Circuit's opinion in
6 *U.S. v. Curtin*, 489 F.3d 935 (9th Cir. 2007) (*en banc*). (CR Doc. 57, Response at 6-7.)

7 In *Curtin*, the defendant was charged with crossing state lines to engage in a
8 sexual act with a minor, and when arrested had stories of sex with minors on an
9 electronic device. The "minor" was actually an undercover agent, posing as a 14 year
10 old girl, with whom the defendant had engaged in internet chats to arrange a meeting.
11 The defense at trial was that the defendant believed the person he was to meet was an
12 adult woman posing as a minor in role-playing and fantasy. The government sought to
13 introduce the stories to show that the defendant's intent was to engage in sex with a
14 minor, not sex with an adult. The Ninth Circuit held that the stories "had probative value
15 with respect to the intent element of the specific intent crime for which he was
16 prosecuted." *U.S. v. Curtin*, 489 F.3d 935, 959 (9th Cir. 2007). Nonetheless, like the
17 court in *Grimes*, the Ninth Circuit held that the trial court had erred in finding an absence
18 of unfair prejudice under Rule 403, based in large part on the trial court's failure to
19 actually read the stories before ruling, which also included descriptions of bestiality.

20 Trial counsel, who was litigating in the Ninth Circuit, not the Eighth, might have
21 preferred to rely upon a case such as *Johnson*. But the controlling authority in the Ninth
22 Circuit was *Curtin*, not *Johnson*. So, trial counsel diligently tried to distinguish *Curtin*
23 on the basis that it involved a defense of a denial of the requisite intent, while Movant's
24 defense was founded upon a denial of knowing possession. He also attempted to
25 distinguish *Curtin* on the basis that there was other evidence to establish Movant's
26 knowing possession (e.g. the forensic evidence from the computer files, etc.), while in
27 *Curtin* the stories were "critical" to the government's case. Still, (perhaps realizing the
28 weakness of that argument), trial counsel argued the most beneficial component of

1 *Curtin*, i.e. its mandate for a careful review of the proffered narratives as part of
2 determining unfair prejudice.

3 Thus, trial counsel did mount as good a defense under Rule 404(b) as the
4 controlling precedent in the Ninth Circuit would permit.

5 Finally, to the extent that more could have been done, trial counsel could have
6 made a reasonable tactical decision to focus his challenges to the story evidence on their
7 prejudicial effect. This was in line with the holdings of not only *Curtin*, but of *Grimes* as
8 well.

9 In sum, Movant fails to show that counsel performed deficiently in objecting to
10 the introduction of the story evidence. Accordingly, Ground 4 is without merit and must
11 be denied.

12
13 **5. Ground 5: Ineffective Assistance re Omitted Evidence**

14 In his Ground 5, Movant argues that trial counsel was ineffective in failing to
15 admit various evidence, including: (a) that other people had access to Movant's
16 residence, computers, computer accounts, and media, and the media (CDs and thumb
17 drives) containing child pornography also contained files related to such third parties; (b)
18 none of his five computers had child pornography in allocated memory; (c) only one of
19 the five computers had child pornography in unallocated space; (d) child pornography
20 was obtained from locations under shared possession with Movant's wife (e.g. her
21 bathroom cabinets, amongst her belongings, and in the center of the top bunk area of the
22 semi truck which she was standing next to when they were stopped; (e) evidence that
23 Movant had purchased the thumb drives to download his wife's pictures; (f) witnesses
24 that he rarely took a computer on the road, and never the one found in the truck, and
25 never took CDs, and always bought types and brands of CDs different from those found;
26 (g) that his thumb drives had disappeared the month before; (h) that illegal activity had
27 occurred in his bank account which resulted in refunds; and (i) that Movant's wife was a
28 perjurer. (Memorandum, Doc. 24 at 13-16.)

1 **a. Ground 5(a): Access by Others**

2 In response to Movant's argument in Ground 5(a) concerning the access by third
3 parties to the computers, accounts, and media, Respondent argues that trial counsel
4 elicited a variety of evidence concerning the mutual access.

5 Ms. McClellan [trial counsel] elicited evidence that others lived in
6 Defendant's household and could have accessed his AOL account
7 when cross-examining the government's witnesses. In her cross-
8 examination of government witness Dean Sehm, Ms. McClellan
9 elicited testimony that Defendant's ex-wife, Sherry Self, lived in his
10 house while they were married; that Defendant's neighbor had
11 access to Defendant's house; that Defendant was previously married
12 to Mildred Self and that Mildred Self owned a computer; and that
13 Sherry Self and his daughter, Robin Self, would often accompany
14 Defendant on trucking trips for long periods of time. (RT
15 11/17/2010 170-72.) In her cross-examination of government
16 witness ICE SA John Koski, Ms. McClellan elicited testimony that
17 none of the rooms in Defendant's residence were locked when the
18 search warrant was executed and a fingerprint found on a seized
19 item of evidence did not match Defendant's fingerprints. (RT
20 11/17/2010 213-14.) In her cross-examination of government
21 witness Sherry Self, Ms. McClellan elicited testimony that a number
22 of people had previously lived in Defendant's residence; that a
number of people visited Defendant's residence; that six different
people had keys to Defendant's residence; that Defendant was gone
for extended periods of time because he was a truck driver; that both
she and Robin Self would sometimes accompany Defendant on
those trips; and that other persons drove Defendant's Kenworth
semi-truck/trailer. (RT 11/17/2010 260-65.) In her cross
examination of government witness Richard Kaplan, Ms. McClellan
elicited testimony that a person with Defendant's user name and
password any person could access his AOL account. (RT
11/17/2010 308.) In her cross-examination of government witness
ICE SA David Potosky, Ms. McClellan elicited evidence that SA
Potosky did not have actual knowledge of who downloaded the
child pornography; that SA Potosky did not know who inserted the
thumb drives in the computer; that SA Potosky did not know who
conducted the searches for child pornography on Defendant's
computer; and that anyone using Defendant's account could have
conducted the searches. (RT 11/17/2010 384-85.)

23 (Response, Doc. 15 at 25-26.)

24 In reply, Movant asserts, in effect, that counsel only addressed these issues in
25 cross examination, and did not affirmatively introduce evidence to show the mutual
26 access. Movant identifies the following evidence available to counsel: (1) evidence from
27 AOL (reflected in Exhibits 3 and 5 to his Memorandum (Doc. 24)); (2) report from the
28 defense's forensic examiner showing someone else's use; (3) a receipt for the purchase

1 of six thumb drives by Sharon Self one month before the search of the truck; (4)
 2 unidentified witnesses to the mutual access; and (5) an unidentified witness to the use of
 3 the computer by his wife. (Reply, Doc. 21 at 13-14.)

4 **AOL Evidence** – In support of his contention that counsel had exculpatory
 5 evidence from AOL, Movant points to Exhibits 3 and 5 to his Memorandum (Doc. 24) in
 6 support of his Motion. However, Exhibit 3 is the defense's Forensic Examiner's report
 7 and makes no reference to exculpatory information from AOL. Exhibit 5 is
 8 Administrative Subpoena to AOL, and simply provides what appears to be a printout of
 9 logins. Movant fails to suggest what exculpatory information is reflected in that exhibit.

10 Moreover, as noted by Respondent, trial counsel did introduce evidence through
 11 cross examination of Richard Kaplan, the government's computer forensic examiner,
 12 that the use of the AOL account was not an irrefutable connection to Petitioner.

13 Q Just a few questions, Mr. Kaplan.

14 Those records indicate who was being billed for this
 15 account; is that correct?

16 A Yes.

17 Q But it does not indicate - - you cannot learn from these
 18 records who the person was that was at the computer at this specific
 19 time mentioned here. You don't know who that person is; is that
 20 correct, based on these records?

21 A That's correct. I'm just reading the records.

22 Q Anyone that was utilizing this IP address who had the correct
 23 password and other information needed to access the website on that
 24 account could have done that, correct?

25 A Well, there's two different sets of records here. For the AOL
 26 set of records you would indeed need the user name and password
 27 of the AOL, that AOL account. For the Verizon record you would
 28 need the actual piece of hardware or device that would connect you
 to the Internet in order to be logged on at that time.

Q But if you had that hardware, and you had the information
 you could access it - - any person could; is that correct?

A Yes.

(CR Doc. 112, R.T. 11/18/10 at 307-308.) Movant fails to suggest what additional
 information could have been adduced from the AOL records.

Forensic Examiner - The defense's forensic examiner conducted a review of the
 computer files. Movant does not indicate the basis on which he concludes that the
 examiner would have shown a third party's use of the computers or media. There is no

1 indication of such a finding in the copy of the examiner's report provided by Movant.
2 (Memorandum, Doc. 24 at Exhibit 3.)

3 Moreover, the examiner would have been subject to cross examination on a
4 number of potentially damaging points, including: (a) findings on the Acer Aspire 5720
5 that reflected 480 hits on the child pornography site DreamZone, including references to
6 Movant's email address, downloads of child pornography, visiting other child
7 pornography sites (*id.* at 12); (b) findings on CD 1 of 1082 child pornography images,
8 and videos from 2006 (*id.* at 18); (c) findings on CD 2 of 36 images of child
9 pornography from February, 2008 (*id.*); (d) findings on one R Data thumb drive of 55
10 images of child pornography, created on December 31, 2008, approximately a half hour
11 after nude images of Movant and an unknown woman were created (*id.*); (e) findings on
12 another R Data thumb drive of 40 WordPerfect files, all containing a header "By Richard
13 Self" and containing incest and child pornography stories (*id.* at 19); (f) findings on one
14 SimpleTech thumb drive of 60 files of child pornography (*id.*); (g) findings on one
15 Verbatim thumb drive of 209 images of child pornography from December 2008 (*id.*);
16 and (h) findings on another Verbatim thumb drive of approximately 5,900 images of
17 child pornography, including banner images for DreamZone and indications that the
18 images originated from that site (*id.*). Thus trial counsel had a reasonable tactical basis
19 for declining to call the defense's forensic examiner.

20 **Receipt for Thumb Drives** – Movant argues the thumb drives were purchased
21 by his wife. Movant proffers nothing to support this contention.

22 Moreover, Movant fails to show how this evidence was significant. To be sure,
23 Movant attempts to paint the thumb drives as belonging to his wife, e.g. by arguing her
24 purchase of them, that they were in her thumbdrive case, and that they were in her
25 favorite color. However, none of this precludes Movant's use of the thumb drives. The
26 drives were discovered in Movant's vehicle, in a case containing thumbdrives Movant
27 indicates were his own. (Memorandum, Doc. 24, Exhibit 20.) Moreover, Movant's ex-
28 wife described the thumbdrives, as well as the case, as belonging to Movant. (CR Doc.

1 112, R.T. 11/18/10 at 250-251.)

2 **Witnesses**- Movant makes broad references to a laundry list of unidentified
3 witnesses, and makes assertions that they would have testified to the mutual access to the
4 computers, and the use of his computer by his ex-wife.

5 With regard to his wife's access to his computer, Movant fails to identify who
6 would have supplied such testimony, simply stating "Defense has a witness that could
7 testify" to her access to the computer. (Reply, Doc. 21 at 14.) With regard to the others
8 with access, Movant simply states that "Defense counsel had witnesses." (*Id.*)

9 A habeas petitioner may not establish ineffective assistance by simply alluding to
10 potential evidence. A petitioner may not simply speculate about what a witness'
11 testimony might be, but must adduce evidence to show what it would have been. *Grisby*
12 *v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997). "[E]vidence about the testimony of a
13 putative witness must generally be presented in the form of actual testimony by the
14 witness or on affidavit. A defendant cannot simply state that the testimony would have
15 been favorable; self-serving speculation will not sustain an ineffective assistance claim."
16 *U.S. v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991).

17 Presumably, Movant could have been called to testify about much of the
18 information. However, Movant would have then been subject to cross examination on a
19 variety of issues.

20 There were witnesses that Movant proposed to the trial court to testify concerning
21 others' access to the computers, and Movant argued that trial counsel wrongly refused to
22 call them, *i.e.* his daughter Robin, his stepdaughter Laura and her husband Jim
23 Holdgrafer. (CR Doc. 112, R.T. 11/18/10 at 237-239.) Counsel explained to the trial
24 court:

25 MS. McCLELLAN: Your Honor, we have interviewed
26 Robin Self and James Holdgrafer and it was my conclusion that
27 those witnesses would not be beneficial for his case and that's why
28 I've decided not to call them. I told Mr. Self that he can testify, and
be prepared for that. And if he wants to testify, that is his decision.
But I told him it's my decision about what other witnesses we're
going to call and it was my decision not to call them. If I thought

1 that they had exculpatory testimony, I would certainly put them on
the stand. But in my opinion, they would not be helpful.

2 THE COURT: Why do you think they would not be helpful?

3 MS. McCLELLAN: Well, they do not - - they cannot say
whether they knew there was any child pornography on those
4 computers. We can't do an alibi, so to speak, for the entire four-year
period that the child pornography was - - the different time periods
5 that there was child pornography downloaded. The testimony
would not be possible for them to say he never had an opportunity
6 to download. They would confirm that they did not put that child
pornography on the computers. And I think other witnesses have
verified that Mr. Holdgrafer had access to the home and Mr. Sehm
7 knew he had lived in the home.

8 And I'm also concerned about Robin Self because of the fact
she's in those photographs in the truck that are not being - - but if
9 she testifies I'm concerned there could be cross-examination
regarding that issue. And her character. And when they
interviewed Mr. Holdgrafer, he said he had read some material. He
10 said he was a good writer. Would be absolutely harmful to the case.

11 So none of them have information that someone else put
child pornography on the computers. So I just - - I do not believe
they would be helpful and in some sense they could actually be
12 harmful to the case.

13 (CR Doc. 112, R.T. 11/18/10 at 240-241.) Thus, at least as to these witnesses, trial
14 counsel had strong tactical reasons to not call them. The more people who had access to
15 the computer who were called to testify, who would then deny responsibility for the
16 child pornography, the more evidence there would be pointing to Movant. And
17 Movant's daughter bore special risks. The trial court ultimately precluded introduction
18 of the photographs found on one of the thumb drives "of Defendant and his adult
19 daughter naked, in his tractor-trailer, wearing only santa hats," finding that they were
20 "not child pornography and likely would inflame the jury with suspicions of incest," and
thus were excludable under Rule 403. (CR Doc. 70, Order 11/12/10 at 9.)

21 Even if the Court could conclude it might have taken a different approach, that
22 would not justify a finding of ineffective assistance. "Mere criticism of a tactic or
23 strategy is not in itself sufficient to support a charge of inadequate representation."
24 *Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980). Movant proffers nothing to
25 suggest that the decision was outside the wide range of professionally competent
26 assistance.

27 Moreover, there was substantial, undisputed evidence before the jury of such
28

1 access. Defense counsel elicited testimony from Dean Sehm, Movant's stepdaughter's
2 husband, that Movant's stepson, Jim Holdgrafer had access to Movant's house. (CR
3 Doc. 111, R.T. 11/17/10 at 171.) And Sehm testified that Movant's deceased wife had
4 lived in the home and used a computer. (*Id.*) Defense counsel elicited testimony from
5 Agent Koski that Holdgrafer had let them into Movant's house to execute the search
6 warrant. (*Id.* at 213.) The prosecution elicited testimony from Movant's ex-wife that
7 Movant's special needs daughter lived with them and had a computer that she used in the
8 home, and that the ex-wife's brother had lived with Movant for some time in 2008-2009.
9 (CR Doc. 112, R.T. 11/18/10 at 256-257.) Defense counsel elicited testimony from
10 Movant's ex-wife that Movant's daughter Robin had lived in his home in 2009, and that
11 Jim and Laura Holdgrafer, Berneta and Dean Sehm, and Robin all had keys to the home
12 and that Laura Holdgrafer's sister, Sandy, and a respite worker also came to the house.
13 (*Id.* at 261-263.) Through this testimony, counsel was able to provide potential other
14 sources for the child pornography, without having them dispelled by providing
15 opportunities for those sources to disclaim using the computer or other responsibility.
16 Movant proffers no reason to believe that further evidence on this point would have
17 swayed the jury from concluding that the child pornography found was attributable to
18 Movant.

19
20 **b. 5(b) and 5(c) Child Pornography in Computer Memory** – Movant argues
21 counsel was ineffective for failing to present evidence that none of his five computers
22 had child pornography in allocated memory. Movant also argues counsel was ineffective
23 in failing to present evidence that only one of the five computers (Petitioner's Acer
24 5720) had child pornography in unallocated space.

25 There was evidence proffered to show that the child pornography was not in
26 allocated space on Petitioner's computer. On direct examination, the prosecution's
27 computer forensic examiner Potosky testified that he examined the hard drive of
28 Petitioner's Acer laptop (trial exhibit 5A) and although he found child erotica and adult

1 pornography, he reported no child pornography. (CR Doc. 112, R.T. 11/18/10 at 336-
2 337.) On the other hand, he also testified that it had been used to access the Dreamzone
3 child pornography website and a folder containing child pornography on one of the
4 thumb drives. (*Id.* at 346.)

5 Movant proffers nothing to suggest that any of this evidence would have altered
6 the outcome of the trial. The prosecution proffered substantial evidence tending to show
7 that Movant had accessed the Dreamzone child pornography website, as well as the
8 thumbdrives containing child pornography, with his laptop. Moreover, the prosecution
9 proffered substantial evidence tending to show that Movant kept child pornography on
10 removable devices and CD drives, etc., rather than preserving it on his computers. Not
11 only was the presence of child pornography saved on the computers unnecessary to the
12 prosecution's case, its absence was not inconsistent with the prosecution's theory of the
13 case (*i.e.* that Movant consistently stored his collection of child pornography on other
14 devices).

15
16 **c. 5(d) Shared Access Areas** – Movant argues that trial counsel was ineffective
17 for failing to present evidence that child pornography was located in areas under shared
18 possession with Movant's wife (e.g. her bathroom cabinets, amongst her belongings, and
19 in the center of the top bunk area of the semi-truck which she was standing next to when
20 they were stopped).

21 In support of this argument, Movant cites a series of cases attempting to define
22 possession in cases where contraband is not found on the defendant's person, but in an
23 area under shared control with others. For example, Movant cites *Delgado v. U.S.*, 327
24 F.2d 641(9th Cir. 1964). In that case, a search of the defendant's home revealed
25 marijuana in the drawer of a night stand next to a bed shared by the defendants. The
26 government failed to introduce any evidence to show possession by either defendant or
27 even both. "But here it is pure speculation as to whether Rodriguez alone, or Delgado
28 alone, or both of them, had possession. No doubt one of them did; perhaps both did."

1 327 F.2d at 642.

2 In contrast, here there was substantial evidence to link the child pornography to
3 Movant (*e.g.* the ties to Movant's computer, his writing on the CDs and thumbdrives, the
4 stories showing his authorship and involving his personal details tending to show his
5 interest in pedophilia, etc.)

6 Moreover, there was evidence before the jury that permitted the inference that
7 there was shared access. This was not child pornography, erotica, etc. found in some
8 hidden place to which Movant had no access or which jurors might presume were not
9 accessible to others. Rather they were found in computers and thumbdrives and
10 bathroom cabinets that a reasonable juror would infer was accessible at least to Movant's
11 wife. Movant fails to proffer anything to suggest that direct testimony on this point
12 would have altered the outcome of the proceeding. *See Strickland*, 466 U.S. at 687-88.

13
14 **d. 5(e) Purchase of Thumbdrives** – Movant argues that counsel was ineffective
15 for failing to introduce evidence to show that Movant had purchased the thumb drives to
16 download his wife's pictures. Movant fails to suggest who would have proffered such
17 testimony.

18 Moreover, Movant's ex-wife testified that various thumbdrives had been used to
19 download her pictures. (CR Doc. 112, R.T. 11/18/10 at 251.) But she also testified that
20 she had never personally used the thumbdrives, but relied on Movant to download
21 pictures to them. (*Id.*) Movant fails to suggest what additional exculpatory inference
22 would have arisen from evidence that Movant had purchased thumbdrives specifically
23 for that purpose, and thus fails to show a reasonable probability that direct testimony on
24 this point would have altered the outcome of the proceeding. *See Strickland*, 466 U.S. at
25 687-88.

26
27 **e. 5(f) Traveling Without Computer and CDs, etc.** - Movant argues that
28 counsel was ineffective for failing to introduce evidence to show that he rarely took a

1 computer on the road, and never the one found in the truck, never took CDs, bought a
2 different type and brand of CDs, etc.. Movant fails to identify who would have testified
3 on this point.

4 Moreover, the testimony at trial was that the computer was even specially
5 equipped to be secured to the steering wheel to be used in his truck. (CR Doc. 112, R.T.
6 11/18/10 at 248.)

7 Movant fails to show a reasonable probability that direct testimony on this point
8 would have altered the outcome of the proceeding. *See Strickland*, 466 U.S. at 687-88.

9
10 **f. 5(g) Disappearance of Thumbdrives** – Movant argues that counsel was
11 ineffective for failing to introduce evidence to show that his thumb drives had
12 disappeared the month before. Movant fails to identify who would have provided such
13 testimony. Moreover, Movant fails to suggest how this would have altered the outcome
14 of the proceeding. Movant does not, for example, suggest a reason why the jury would
15 have inferred from such theft that the child pornography found on the thumbdrives in
16 Movant's possession was not his. Given the substantial evidence attributing the child
17 pornography to Movant, the undersigned cannot find a reasonable probability that
18 evidence on this point would have altered the outcome of the proceeding. *See*
19 *Strickland*, 466 U.S. at 687-88.

20
21 **g. 5(h) Illegal Access to Bank Account** - Movant argues that counsel was
22 ineffective for failing to introduce evidence to show that illegal activity had occurred in
23 his bank account which resulted in refunds. Movant fails to show how this would have
24 been exculpatory.

25 Perhaps Movant believes that this would have called into question the charges
26 from the Dreamzone website on Movant's bank card. However, those charges were
27 attributed to Movant by the evidence on his computers (e.g. emails) showing access to
28 and purchasing of access on the Dreamzone site. Movant fails to show a reasonable

1 probability that evidence on this point would have altered the outcome of the proceeding.
2 *See Strickland*, 466 U.S. at 687-88.

3
4 **h. 5(i) Impeachment of Ex-Wife** - Movant argues that counsel was ineffective
5 for failing to introduce evidence to show that Movant's wife was a perjurer.
6 (Memorandum, Doc. 2 at 16.) In support, Movant references his Exhibits 12 and 17.

7 Exhibit 12 is a Petition for Order of Protection filed by Movant's ex-wife. He
8 contends she lied when asserting he had asked her to take his disabled daughter out of
9 the state, and that he had been arrested for sexually abusing his other daughter.

10 Exhibit 17 is his ex-wife's Petition for Annulment of Marriage, dated March 4,
11 2010. She alleged that he was "currently under investigation and is on the run from the
12 FBI, Homeland Security, Immigration and Customs Enforcement for suspected drug
13 smuggling" and that he had a "prior arrest for sexual assault against his daughter."
14 (Memorandum, Doc. 24, Exhibit 17, Petition at 2.)

15 Federal Rule of Evidence 608(b) provides that "extrinsic evidence is not
16 admissible to prove specific instances of a witness's conduct in order to attack or support
17 the witness's character for truthfulness." Thus, trial counsel would not have been able to
18 introduce evidence to show that Movant's ex-wife had lied in these two petitions.

19 Moreover, Petitioner proffers no evidence to counter the contentions asserted in
20 these documents. He simply provides his own bald assertions that they were false.

21 To be sure, he provides a letter from his daughter, Robin, denying any molestation
22 of her disabled sister. (Memorandum, Doc. 24, Exhibit 22.) However, this was based on
23 her assertion that she was "told the story how she accused my dad of molesting
24 her...[and when confronted] it wasn't true." (*Id.* at 1-2.) Thus, any testimony by Robin
25 on this point would have been hearsay, and inadmissible. *See* Federal Rule of Evidence
26 802, *et seq.*

27 Movant also provides a statement from Robin denying that Movant molested her
28 or that he "went to jail." (Memorandum, Doc. 24, Exhibit 13.) However, counsel would

1 have had a tactical reason to not present testimony by her, given the nude photos of her
2 and Movant found amongst Movant's computer files.

3 Moreover, counsel would have had a tactical reason to not impeach Movant's ex-
4 wife on the issue of the molestation allegations, which would have brought the
5 allegations to the attention of the jury, potentially inviting assumptions of molestation
6 and incest.

7 Movant fails to support this claim by showing evidence available to and usable by
8 trial counsel to impeach Movant's ex-wife.

9 Moreover, even had counsel successfully impeached Movant's ex-wife on some
10 or all of these points, the undersigned cannot find a reasonable probability that the
11 outcome of the proceeding would have been different. Her testimony was of little
12 consequence in the proceeding, providing little more than affirmation that the laptop and
13 cellular wifi belonged to Movant (which Movant does not deny) (CR Doc. 111, R.T.
14 11/17/10 at 229; CR Doc. 112, R.T. 11/18/10 at 247-249), that the thumbdrives and CD
15 discs belonged to Movant and had his handwriting on them (CR Doc. 112, R.T. 11/18/10
16 at 250-255), and that there had been fictional stories in the home but they did not belong
17 to her (*id.* at 256) (which Movant does not deny). There was other substantial evidence
18 tying Movant to the thumbdrives and CD discs, *e.g.* the trace evidence on the computers,
19 the "stories" and their connections to Movant, and the evidence of Movant's access to
20 the Dreamzone website.

21 Accordingly, Movant has failed to support this claim of ineffective assistance.
22

23 **i. Summary re Ground 5** - Movant's Ground Five is based on the contention
24 that trial counsel was ineffective in failing to present various evidence. For the reasons
25 discussed hereinabove, Movant has failed to show ineffective assistance, and Ground 5 is
26 without merit.

27 //

28 //

6. Ground 6: Ineffective Assistance re Probation Officer Interview

In his Ground 6, Movant asserts that trial counsel was ineffective because counsel failed to have the presentence report corrected and refused to let the probation officer interview Movant, members of Movant's family, or any of Movant's friends. Respondent argues that Movant fails to show that such interviews would have altered the sentence, and that the record indicates that Movant was provided an opportunity to be interviewed, but declined. (Response, Doc. 15 at 27-28.) Movant replies that defense counsel declined the interview, and that an interview would have permitted him to review the presentence report and there were various inaccuracies in the report. (Reply, Doc. 21 at 19-23.)

Errors in Presentence Report – Movant complains that counsel failed to correct errors in the presentence report. In particular, Movant asserts issues concerning: (1) false allegations of an incestuous affair between Movant and his daughter; (2) false allegations that Movant molested his daughter and was arrested for it; (3) an erroneous alias; (4) an error in Movant's date of birth and social security number; (5) multiple references to the same grand theft auto offense for which he was released; (6) multiple references to the same offense of interstate transportation of a stolen vehicle; (7) multiple references to the same assault charge; (8) false allegations of forcible rape by a girl he dated; (9) a failure to appear arrest resulting from various circumstances.

Here, Petitioner was given a sentence "at the bottom of the guidelines." (CR Doc. 114, R.T. 3/14/11 at 11.) Moreover, he was classified by the Court as having a criminal history category of I, the result of a finding of 0 criminal history points. (*Id.* at 6; Presentence Report, Doc. 28 at 11.) *See* Federal Sentencing Guidelines Manual 5A, Sentencing Table. In sentencing him, the Court considered "hundreds of photographs and videos" depicting child pornography in Movant's possession, that they were purchased perpetuating the market in them, the addictive fixation on sexual abuse of children reflected in the stories written by Movant, Movant's failure to accept responsibility, and (to Movant's advantage) the incidental nature of the interstate

1 transportation. (CR Doc. 114, R.T. 3/14/11 at 10-12.)

2 Movant sought a variance or departure based upon his age and ill health, which
3 the Court rejected. (*Id.* at 5-6.)

4 Movant complains that there were multiple references in the presentence report to
5 various convictions or arrests. That is true. (*See* Presentence Report, Doc. 28 at 11-13,
6 19.) However, the Report also concluded that none of those were “scoreable,” and relied
7 upon them only to note that they were “concerning” because they involved allegations of
8 “crimes of violence,” *e.g.* false imprisonment, assault, aggravated battery, rape under
9 threat of harm, assault to commit rape/robbery, etc. (*Id.* at 19.)

10 To the extent that Movant contends that his participation in the interview would
11 have corrected false allegations concerning incest, rape of his girlfriend, etc. Movant
12 proffers nothing to suggest that he had anything to provide the probation officer other
13 than his denials to counter the allegations, and fails to proffer anything to show that the
14 outcome would have been different had he provided those denials.

15 Moreover, there is no indication that the Court considered any allegations of (1)
16 incest, (2) molestation, (3) forcible rape, or any of the (5), (8) arrests not leading to
17 convictions, or any of the (6), (7), (9) prior convictions. There is no indication the Court
18 considered, nor would there be any reason for the Court to have considered or been
19 swayed by the errors in (3) an alias, or (4) Movant’s date of birth or social security
20 number. Movant proffers no suggestion how this would have altered the outcome. As
21 noted, the sentence given to Movant was at the bottom of the guidelines. The
22 undersigned cannot find a reasonable probability that had Movant proffered his denials
23 and corrections on these various disputed issues that he would have received something
24 less than the bottom of the guidelines.

25 Thus, even had counsel objected to these matters and obtained corrections, there
26 is not a reasonable probability that Movant’s sentence would have been altered.

27 **Failure to Permit Interviews** - Movant’s argument concerning the interview is
28 in two disparate veins. The first relates to the interviews themselves. The second relates

1 to the review of the presentence report.

2 With regard to the interviews themselves, with one exception, Movant fails to
3 proffer any information he, his family, or his friends would have provided the probation
4 officer that would have altered his sentence.⁷ This portion of the argument is conclusory
5 and without merit.

6 Moreover, with respect to Movant, as argued by Respondents, there was a real
7 risk that Movant's lack of acceptance of responsibility and/or remorse could have
8 resulted in a worse outcome. *See U.S. v. Herrera-Figueroa*, 918 F.2d 1430, 1434-1435
9 (9th Cir. 1990). Moreover, "[i]n conducting the presentence interview, the probation
10 officer is entitled to seek information regarding [allegedly criminal conduct of which the
11 defendant has not been convicted], which information, if inculpatory, may provide the
12 basis for a significant increase in his sentence." *Id.* at 1435. Here the prosecution was
13 prepared to present evidence of substantial uncharged conduct. The prosecution made a
14 record at trial of the additional conduct that they were prepared to offer on rebuttal if
15 Petitioner testified:

16 MR. DOKKEN: We've subsequently acquired information
17 from Dreamzone which we would bring in rebuttal, and we do have
a rebuttal witness here.

18 THE COURT: Right, that was mentioned yesterday morning.

19 MR. DOKKEN: With all of the matches, and it matches stuff
20 that we found on the search warrant with M & I Bank, that that was
in fact his bank and that was entered with Dreamzone. All of his
personal information would match, and of course that would open
the door.

21 Additionally, we've done -- we had done additional analysis
22 and we found 7500 images on the one thumb drive and we found a
whole lot more sites that he had gone to, and they all have very bad
names that make them obvious they're child porn sites, and they're
on his computer. I've shown counsel that.

23 I've shown the 32 days that he's used that computer to access
24 Dreamzone, and that all of course would be fair game for me to ask
on cross-examination. And I showed her what I was planning on
25 asking.

26 ⁷ Movant argues that the alleged misinformation in the PSR was damaging to his family.
27 The *Strickland* standard is not met by any showing of harm, but rather only by a showing
28 that the outcome of the proceeding was affected. However unfortunate any such
collateral harm might be, it does not provide a basis for a finding of ineffective
assistance.

1 (CR Doc. 112, R.T. 11/18/10 at 402.) For those reasons, counsel could have made a
2 strategic decision to not have Movant meet with the probation officer.

3 Movant does contend that had his daughters been interviewed, they would have
4 countered assertions that Movant had molested them. Assuming the probation officer
5 and/or the Court would have found such denials credible, there is no indication that this
6 would have altered the outcome of the proceeding. As noted above, the allegations of
7 molestation were not relied upon by the Court in sentencing Movant.

8 The second part of Movant's argument is that if he had been allowed to go to the
9 interview, he would have been able to correct various errors in the presentence report.
10 However, as discussed hereinabove, Movant has failed to show that those errors affected
11 the outcome of the proceeding. Moreover, as discussed hereinabove, the risks of such an
12 interview were strong support for strategic decisions to deny the interview. Further,
13 there was no reason to encounter those risks, given the fact that the report was available
14 to Movant and to counsel, and they were entitled to object to any inaccuracies. *See* Fed.
15 R. Crim. P. 32(f).

16 To be sure, Movant asserts in his Reply that he never received the report from the
17 probation officer or defense counsel, and never reviewed the report with counsel.
18 (Reply, Doc. 21 at 19-20.) However, counsel represented to the Court that she had
19 reviewed the presentence report with Movant. (CR Doc. 114, R.T. 3/14/11 at 3.)
20 Movant did not counter that representation. When later asked whether he had anything
21 he would like to say, Movant responded "No, sir." (*Id.* at 8.) Further, Movant made
22 explicit references to the "Probation Report" in his pre-sentencing letter to the trial court,
23 including referencing the allegations of molestation. (CR Doc. 96 at 2.) The undersigned
24 finds the latter convincing evidence that Movant had reviewed the report at the time of
25 trial.

26 Ground 6 is without merit, and should be denied.

27 //

28 //

7. Ground 7: Ineffective Assistance re Evidence of Third Party

In his Ground 7, Movant argues that counsel was ineffective by failing to (a) present evidence from the forensic expert that someone else could have committed the crime. (Motion, Doc. 1 at 11.) Movant further argues counsel failed to: (b) pursue discovery and disclosures from the prosecution (Memorandum, Doc. 24 at 19); (c) investigate whether another person authored the “stories” (*id.*); (d) object to the “stories” (*id.* at 20); (e) failing to call witnesses for the defense (*id.*); (f) present a defense (*id.*); (g) investigate information that Movant did not own a computer until May 2008, that the other computers were clean, and available for others to use, and that program used to write the stories was not on his computer (*id.* at 20-21); (h) show that the computers could not have been placed on the bottom bunk of the truck (*id.* at 21); (i) impeach the government’s witnesses (*id.*); and (j) object to references to his ex-wife as such at trial even though they remained married (*id.* at 22).

Respondents argue that Movant is simply disagreeing with counsel’s trial strategy, and the strategy was reasonable, and the outcome at trial would not have been altered. (Response, Doc. 15 at 28-30.)

Movant replies by arguing the merits of his claims and by asserting additional failures of counsel (e.g. to present bank statements showing illegal activity on account, to impeach his ex-wife, to impeach Agent Shrable, to pursue undisclosed handwritten stories, to present evidence of the disappearance of his ex-wife’s brother, to have the jury instructed on his theory of defense etc.). The undersigned does not reach the purported deficiencies of counsel raised for the first time in the reply. “The district court need not consider arguments raised for the first time in a reply brief.” *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007).

Unsupported Allegations - Movant fails to support most of his allegations. He fails to (a) identify what evidence from the forensic examiner would have been exculpatory. Moreover, the report of the forensic examiner indicates her testimony would have served to substantiate most of the prosecution’s forensic evidence, giving

1 counsel a strategic reason to decline to call her.

2 He fails to suggest (b) what additional discovery or disclosures from the
3 prosecution would have provided to assist in his defense.

4 He fails to suggest (c) what additional investigation could have been done to
5 establish that someone else authored the “stories.”

6 He fails to suggest (g) what other information was available to show that Movant
7 did not own a computer until May 2008. He does reference the manufacture date, etc. of
8 the laptop seized from his truck. That would not however, preclude Movant from having
9 owned a different computer in the past. For that matter, Movant was not required to own
10 a computer to have downloaded the child pornography. Similarly, the absence of the
11 WordPerfect program from the computers seized does not establish that he did not have
12 access to a different computer in the past which had the software available, or that he did
13 not have access to a computer capable of saving the documents in a WordPerfect format.

14 Movant fails to suggest who could have testified (h) that the computers could not
15 have been placed on the bottom bunk of the truck. At best, Movant suggests that it was
16 not his practice to place them there. That would not have precluded them from having
17 been placed there at the time of seizure. To the extent that Movant could have testified
18 as to this practice, for the reasons discussed hereinabove, counsel had valid strategic
19 reasons to not call Movant to testify.

20 Moreover, there is not a reasonable probability that this evidence would have
21 altered the outcome. Movant does not suggest that the computers were not his and his
22 wife’s, merely that they were found in an unexpected location. Perhaps, if the only place
23 evidence of child pornography had been found was on these laptops, there might be
24 some persuasive effect to showing the unusual placement. Given all the other
25 connections pointing to Movant, there is no reasonable probability that the outcome
26 would have been changed.

27 Finally, Movant fails to suggest any prejudice from counsel’s failure to object to
28 references to his ex-wife as such at trial even though they remained married. Movant’s

1 marital status was not an issue in the case, and his ex-wife testified that she had filed for
2 an annulment and the matter was still pending. (CR Doc. 112, R.T. 11/18/10 at 259,
3 260.)

4 **Repetitive Allegations** – The balance of the allegations in Ground 7 are
5 repetitive.

6 His allegations concerning (d) objections to the “stories” is without merit. As
7 discussed hereinabove in connection with the related Ground 3(b), arguing counsel was
8 ineffective in failing to assert a claim of prosecutorial misconduct in relation to the
9 “stories,” counsel did object to their introduction. Movant fails to show what additional
10 arguments could have been raised.

11 His allegations regarding (e) failing to call witnesses for the defense is without
12 merit. As discussed hereinabove in connection with the related Ground 5(a), arguing
13 counsel was ineffective in failing to present evidence that others had access to the
14 computers, the witnesses proposed by Movant could provide little assistance beyond
15 denying their own culpability, and counsel had valid strategic reasons for not calling
16 them.

17 Movant’s allegation that counsel (f) failed to present a defense is without merit.
18 Counsel asserted a variety of procedural defenses, including a motion to suppress, and
19 opposing the introduction of various evidence, and cross-examining witnesses in an
20 attempt to convince the jury that the government could not prove its case beyond a
21 reasonable doubt. While complete failure to defend a criminal case is ineffective
22 assistance, the constitution does not require counsel to manufacture a defense where
23 none exists. *See U.S. v. Hamilton*, 792 F.2d 837 (9th Cir. 1986). “The sixth amendment
24 does not require counsel to invent a defense.” *Haynes v. Cain*, 272 F.3d 757, 764 (5th
25 Cir. 2001), *reh’g granted on other grounds*, 284 F.3d 604 (5th Cir. 2002).

26 In many cases, the law and facts will be so overwhelmingly in favor
27 of the government that defense counsel can do little more than try to
28 poke holes in the government's case in cross-examination. The
hopelessness of some cases may even relegate the most competent
defense counsel to the role of official hand-holder. The Sixth

Amendment does not hold an attorney responsible for the difficulty of the case he inherits. The choice to pursue a bad strategy makes no comment on an attorney's judgment where no better choice exists.

Hendricks v. Calderon, 70 F.3d 1032, 1042 (9th Cir. 1995).

Movant's arguments that (g) counsel failed to show that the other computers were clean, and available for others to use is without merit for the reasons discussed hereinabove in connection with Grounds 5(a), (b), (c), and (d).

Movant's allegations that counsel (i) failed to adequately impeach the government's witnesses is without merit for the reasons discussed hereinabove in connection with Grounds 3(d) (prosecutorial misconduct re perjured testimony) and 5(i) (impeachment of ex-wife).

For the foregoing reasons, Ground 7 is without merit and should be denied.

8. Ground 8: Ineffectiveness Re New Counsel And Sentence

Liberal construed, in his Ground 8, Movant argues that "counsel" was ineffective for: (a) failing to object to the abuse of discretion in refusing to provide new counsel; (b) failing to object to a conviction for the greater and lesser included offenses (Motion, Doc. 1 at 12); and (c) failing to object to the imposition of multiple special assessment fees despite the decision to impose concurrent sentences (Memorandum, Doc. 24 at 24-25.)

Respondent argues that the claim is really an assertion that the trial court abused its discretion in denying new counsel and that such claims should have been raised on direct appeal and are now procedurally defaulted. Respondent further argues that the procedural default is not excused by an ineffectiveness of appellate counsel in failing to bring the claim, because the claim is without merit. Finally, Respondent argues that the request for new counsel would have been without merit and defense counsel performed adequately and Movant fails to show any prejudice. (Response, Doc. 15 at 30-32.)

In his Reply, Movant reiterates that his claim is one of ineffective assistance, and argues the merits of his request for new counsel.

1 Movant also asserts new claims in his reply regarding: failure to object to the
 2 admission of the “stories,” and failure to object to his wife testifying against him before
 3 the termination of their marriage. (Reply, Doc. 21 at 29-30.) The undersigned does not
 4 reach these purported deficiencies of counsel raised for the first time in the reply. *See*
 5 *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007).

6 **Procedural Default** – Respondent argues that Ground 8 is procedurally
 7 defaulted. That argument is based upon a characterization of the claim as a direct attack
 8 on the denial of new counsel. The Court’s service Order did construe Ground 8 as
 9 asserting that the trial court “abused its discretion.” (Doc. 4 at 2.) However, upon
 10 evaluation of the Motion to Vacate in light of the Reply (Doc. 21), it is clear that Movant
 11 intends to assert a claim of “Ineffective Assistance of Counsel for failing to Show Abuse
 12 of Discretion by the Court.” (Reply, Doc. 21 at 27.) A claim of ineffective assistance is
 13 properly brought in the first instance in a motion to vacate pursuant to 28 U.S.C. § 2255,
 14 rather than on direct appeal. *See United States v. Pope*, 841 F.2d 954, 958 (9th Cir.1988);
 15 *Massaro v. U.S.*, 538 U.S. 500, 509 (2003) (“failure to raise an ineffective-assistance-of-
 16 counsel claim on direct appeal does not bar the claim from being brought in a later,
 17 appropriate proceeding under § 2255”). Accordingly, the undersigned concludes that
 18 Ground 8 is not procedurally defaulted.

19 Of course, to the extent that Movant might have intended to assert direct
 20 challenges on these decisions of the trial court, the claims would be procedurally
 21 defaulted for failing to raise them on direct appeal. The general rule is “that claims not
 22 raised on direct appeal may not be raised on collateral review unless the petitioner shows
 23 cause and prejudice.” *Massaro v. U.S.*, 538 U.S. 500, 504 (2003). Thus, a section 2255
 24 movant raising a claim for the first time in post-conviction proceedings is in procedural
 25 default, and is precluded from asserting the claim. *Bousley v. U.S.*, 523 U.S. 614, 621
 26 (1998) (finding default where petitioner challenging his guilty plea did not raise claim in
 27 direct appeal); *United States v. Frady*, 456 U.S. 152, 165 (1982) (noting that a motion to
 28 vacate or modify a sentence under 28 U.S.C. § 2255 cannot be used as a substitute for a

1 direct appeal). “Where a defendant has procedurally defaulted a claim by failing to raise
2 it on direct review, the claim may be raised in habeas only if the defendant can first
3 demonstrate either ‘cause’ and actual ‘prejudice,’ or that he is ‘actually innocent.’”
4 *Bousley*, 523 U.S. at 622 (citations omitted). Ineffective assistance of counsel may
5 constitute cause for failing to properly exhaust claims in state courts and excuse
6 procedural default. *Ortiz v. Stewart*, 149 F.3d 923, 932, (9th Cir. 1998).

7 To the extent that Movant intended to assert the ineffective assistance of appellate
8 counsel as cause to excuse his failure to present the claims on direct appeal, because the
9 underlying substantive claims are without merit (for the reasons discussed hereinafter),
10 the undersigned could not find that appellate counsel performed deficiently in failing to
11 raise the claims, and could not find prejudice, either to support the prejudice component
12 of the claim of ineffective assistance of appellate counsel, or to support the prejudice
13 component of the assertion of “cause and prejudice,” to excuse the procedural default.

14
15 **a. 8(a): IAC re New Counsel** – In part (a), Movant argues that counsel was
16 ineffective for failing to object to the denial of new counsel. Movant argues that there
17 was a breakdown of communications and trust between Movant and trial counsel. As
18 evidence of that breakdown, Movant points to counsel’s failure to investigate and failure
19 to call witnesses. To sustain this claim, Movant must show not only the trial counsel was
20 obligated to take some action in support of Movant’s request for new trial, but that
21 Movant was prejudiced from trial counsel’s failure to do so.

22 Movant does not show that trial counsel performed deficiently at the time of the
23 request for new counsel. For example, Movant does not suggest what other arguments
24 should have been made, or how they would have altered the outcome of the proceeding.
25 To be sure, Movant argues that the trial court wrongly rejected the request, but he does
26 not assert that the trial court was not armed with the requisite facts or law to address the
27 issue. To the contrary, he asserts that the trial court held a hearing and had “knowledge
28 that [trial counsel] was no[t] investigating nor was she going to be calling witnesses.”

(Memorandum, Doc. 24 at 23.)

Nor does Movant show prejudice from any purported deficiency.⁸ Movant's various claims of deficient performance by trial counsel are addressed throughout this Report & Recommendation. Movant has failed to show that trial counsel rendered ineffective assistance. Thus, there is no basis to conclude that had counsel been effective in having herself replaced, that new counsel would have obtained a better result.

b. 8(b): IAC re Lesser Included Offenses – In his Ground 8(b), Movant argues that trial counsel was ineffective in failing to challenge his conviction for lesser included offenses and the greater offense. This is the same argument raised in Ground 2, and for the reasons discussed hereinabove, the claim is without merit.

c. 8(c): IAC re Special Assessments – Finally, Movant argues that trial counsel was ineffective for failing to challenge the trial court's imposition of separate special assessments while imposing concurrent sentences.

Here, the judgment against Movant assessed \$600 in special assessments against Movant. (CR Doc. 97 at 1.) Under 18 U.S.C. § 3103(a)(2)(A), the Court was required to assess \$100 for *each* felony offense. *See U.S. v. Luongo*, 11 F.3d 7, 10 (1st Cir. 1993).

Still, Movant cites a series of cases where the courts found prejudice because (although the defendant was sentenced to concurrent sentences) multiple special assessments were levied. (Memorandum, Doc. 24 at 24.)

The first set of cases involve double jeopardy violations, in which the multiple special assessments established the multiple punishments despite concurrent prison sentences. *See e.g. U.S. v. Robertson*, 606 F.3d 943 (8th Cir. 2010) (requirement of

⁸ A direct challenge to the denial of a request for new counsel would be based upon an abuse of discretion standard, considering “(1) the timeliness of the motion; (2) the adequacy of the district court's inquiry; and (3) whether the asserted conflict was so great as to result in a complete breakdown in communication and a consequent inability to present a defense.” *U.S. v. Mendez-Sanchez*, 563 F.3d 935, 942 (9th Cir. 2009). Here, however, Movant's claim is presented as one of ineffective assistance, making *Strickland's* requirement of a different outcome the requisite standard.

1 prejudice when applying plain error review of double jeopardy claim met by multiple
2 special assessments); *U.S. v. Christner*, 66 F.3d 922 (8th Cir. 1996) (same); *U.S. v.*
3 *Grubbs*, 829 F.2d 18 (8th Cir. 1987) (same). *See also Rutledge v. U.S.*, 517 U.S. 292
4 (1996) (multiple special assessments amounted to double punishment for double
5 jeopardy purposes). Here, however, for the reasons discussed hereinabove in connection
6 with Ground 2, Movant fails to make out a double jeopardy violation, not because of the
7 lack of multiple punishments, but because the offenses are separate offenses. Thus these
8 double jeopardy cases are inapposite.

9 The second type of case cited by Movant involved the “concurrent sentence
10 doctrine.”

11 Where the conviction on one count is found to be valid by the
12 appellate court, or is not challenged on appeal, the court may
13 decline to address issues directed only to the other counts. The court
14 could summarily affirm if a ruling in defendant's favor would not
reduce the length of a defendant's entire sentence or the amount of a
fine or otherwise prevent some prejudice to the defendant. This is
the so-called "Concurrent Sentence Doctrine."

15 1 Federal Criminal Appeals § 3:54. *See Ray v. U.S.*, 481 U.S. 736 (1987) (concurrent
16 sentence doctrine inapplicable because of multiple special assessments). Here, however,
17 Movant has not been denied review of a particular conviction based upon his having
18 received concurrent sentences. Accordingly, *Ray* is inapposite.

19 In sum, none of the cases cited by Movant preclude the imposition of multiple
20 special assessments where, as here, the defendant has been properly convicted of
21 multiple offenses. Accordingly, Movant has failed to show a viable challenge to the
22 multiple special assessments which counsel could have asserted.

23 24 **9. Summary**

25 For the reasons set forth hereinabove, Movant has failed to provide any ground
26 for relief. Accordingly, the Motion to Vacate must be denied.

27 //

28 //

IV. CERTIFICATE OF APPEALABILITY

Ruling Required - Rule 11(a), Rules Governing Section 2255 Cases, requires that in habeas cases the “district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Such certificates are required in cases concerning detention arising “out of process issued by a State court”, or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

Here, the Motion to Vacate is brought pursuant to 28 U.S.C. § 2255. The recommendations if accepted will result in Movant's Motion to Vacate being resolved adversely to Movant. Accordingly, a decision on a certificate of Appealability is required.

Applicable Standards - The standard for issuing a certificate of appealability (“COA”) is whether the applicant has “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

Standard Not Met - Assuming the recommendations herein are followed in the district court’s judgment, that decision will be on the merits. Under the reasoning set forth herein, the claims are plainly without merit.

Accordingly, to the extent that the Court adopts this Report & Recommendation as to the Motion to Vacate, a certificate of appealability should be denied.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the Movant's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, filed July 29, 2013 (Doc. 1) be **DENIED**.

IT IS FURTHER RECOMMENDED that, to the extent the foregoing findings and recommendations are adopted in the District Court's order, a Certificate of Appealability be **DENIED**.

VI. EFFECT OF RECOMMENDATION

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of Appellate Procedure*, should not be filed until entry of the district court's judgment.

However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also* Rule 10, Rules Governing Section 2255 Proceedings. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

Dated: October 31, 2014

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James F. Metcalf
United States Magistrate Judge